No. 2459.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

THAMES & MERSEY MARINE INSURANCE COMPANY, LIMITED, a corporation,
Appellant,
vs.
PACIFIC CREOSOTING COMPANY, a corporation,
Appellee.

No.....

BRIEF FOR APPELLEE

W. H. Bogle,
Carroll B. Graves,
F. T. Merritt,
Lawrence Bogle,
Proctors for Appellee.

Filed this.....*day of October, 1914.*

FRANK D. MONCKTON, Clerk,

By.....*Deputy Clerk*

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STATEMENT.

This cause was a suit *in personam* brought by the Pacific Creosoting Company against the Thames & Mersey Marine Insurance Company, Limited, to recover upon a policy of marine insurance covering

a shipment of creosote in iron drums from London, England, to Eagle Harbor, Washington, on board the British bark Sardhana. The shipment consisted of 2,753 iron drums containing 251,134 imperial gallons of creosote, and was loaded aboard the bark Sardhana in the month of May, 1908, at London, England, the loading of the same having been completed on or about May 29, 1908, and the said bark having sailed on her voyage to Eagle Harbor on or about May 30, 1908. On or about the 2nd day of June, 1908, the Pacific Creosoting Company, appellee herein, being the owner of the said cargo, effected insurance with the Thames & Mersey Marine Insurance Company, appellant herein, to the extent of £931 upon the said cargo of creosote in drums, including packages and advanced freight, the total of which was valued at £7,450, and the said appellee on the same day paid to the appellant the sum of £44-18-10 as premium on said insurance, which amount was accepted by appellant and its policy issued and delivered to the appellee, which policy is a part of the record in this case, marked Libelant's Exhibit "A." Said bark completed her voyage and arrived at Eagle Harbor on the 9th day of November, 1908, and on the 17th day of November, 1908, commenced to discharge her cargo into lighters which were brought alongside the ship.

On the 18th day of November, 1908, while said bark was lying at Eagle Harbor discharging her cargo into lighters, a fire broke out in the after tween decks of the ship, which with the assistance of the crews of the ship "Jupiter" and the ship "Hornelen," and with the assistance of the employees of the Pacific Creosoting Company, was finally extinguished.

During the course of the discharging of said bark, and on the night of November 25th, a barge which was moored alongside and upon which 272 drums of creosote had been loaded, capsized, and the contents of the barge were thrown into the bay. Subsequently 268 of the said drums were salved by a diver, and four of the said drums, together with their contents, were entirely lost. At the time said bark commenced to unload her said cargo and during the time of the discharging thereof, Mr. Frank Walker, a marine surveyor, surveyed the said cargo, and found that of the entire original shipment of 2,753 drums, 2,012 drums were delivered full and in good order and that 716 of said drums were delivered in damaged condition and partially empty, and that twenty-five of said drums were delivered in a damaged condition and entirely empty. Subsequently Mr. Walker, with the assist-

ance of the employees of the Pacific Creosoting Company, emptied the contents of the said damaged drums into the creosote tank of the appellee company, and found that of their original contents, said damaged drums containing 80,917 and 2/10 gallons when shipped, only 23,650 gallons were contained in the said drums when delivered to the appellee company at Eagle Harbor and measured, leaving a shortage of 56,267 and 2/10 gallons upon delivery.

This suit is brought to recover from appellant insurance company its proportion of the value of the 741 drums which were delivered in a damaged and worthless condition, and of the 56,267 and 2/10 gallons of creosote which were short upon delivery, and for its proportion of the "sue and labor" expenses incurred by the Pacific Creosoting Company in salving the contents of the lighter which was capsized on November 21. The amount claimed by the insured being that apportioned against the appellant company in a particular average adjustment which was made by Messrs. Johnson & Higgins, average adjusters, and dated May 18, 1909, copy of which adjustment appears on pages 23, 24 and 25 of the record, the said adjustment being in evidence in this cause as Exhibit "B." Upon appellant's refusal to pay its pro rata share of the loss, damage

and expenses incurred by the appellee, this suit was brought.

It is alleged in the libel that the said bark "Sardhana," with the said cargo of creosote and drums aboard, in the course of her voyage encountered gales and heavy seas, causing her to roll and labor heavily and to such an extent that the cargo worked and became adrift, and many of the drums containing creosote were damaged, and that a large quantity of the said creosote escaped into the hold of the said ship, and was subsequently lost, and that upon her arrival at Eagle Harbor the cargo was in a badly damaged condition, caused by the perils of the sea encountered on her voyage. It is then alleged that on November 18, while lying in said port of Eagle Harbor and before discharging said cargo, a fire broke out in the after tween decks of said ship, and burned the bulkhead forward of the lazarette, the door thereof and a considerable portion of dunnage and other parts of said ship; that outside assistance was procured and after considerable difficulty the fire was extinguished. It was further alleged that libelant (appellee) by reason of the said damage to and loss of cargo and "sue and labor" expenses incurred had been damaged in the total amount of $9,570, of which amount re-

spondent (appellant) was liable, under its policy, to the extent of $1,197.20. It is further alleged that said damage to and loss of cargo was caused entirely by tempestuous weather, and was not in any wise attributable to any unseaworthiness of the vessel, and that the damage to and loss of said cargo and the expenses incurred by said libelant in salving same were such as were contemplated in and insured by the policy issued by the respondent (appellant) company.

In its answer appellant herein admitted the execution of the policy, the payment of the premiums, etc., denied any knowledge as to the conditions of the weather encountered on said voyage, the allegations as to the fire on November 18, the allegation as to the capsizing of the lighter on November 21, and subsequent salvage expenses incurred, and generally denied any knowledge as to the extent of the loss sustained by the appellee herein. Appellant specifically denied that the said loss and damage and expenses incurred by appellee were such as were contemplated in and insured by its policy, and denied that it is liable to appellee for any sum whatever.

Appellant affirmatively alleged that by the terms of its policy of insurance, the cargo was warranted free from particular average subject to cer-

tain exceptions, and that appellee's loss, if any, was a particular loss and not within the exceptions. Appellant further affirmatively alleged that said policy was issued in the city of London, Kingdom of Great Britain, and is to be governed by the laws of that kingdom, and that said bark Sardhana was not on November 8, 1908, or at any other time "on fire" within the terms of the policy as construed under the English law.

Upon the issues as thus presented, and the testimony taken in support thereof, the lower court found in favor of the libelant, appellee herein, and a decree was accordingly entered in favor of the libelant, appellee herein, against the respondent, appellant herein, for the full amount of damages as claimed and alleged in the libel herein. From this decree the appellant has appealed, and has filed eighteen separate assignments of error. These various assignments of error, for the purpose of argument, may be grouped as follows:

1. Construction of the F. P. A. warranty in the marine insurance policy sued on herein (Assignments of Error 1-4).

2. Was the Sardhana "on fire" within the construction of the F. P. A. warranty (Assignments of Error 5, 6, 7).

3. Sue and labor expenses (Assignments of Error 8, 9).

4. Extent and cause of loss and damage (which covers the balance of the assignments of Error).

Before commencing our argument we wish to state that we are at a disadvantage in writing this brief, for the reason that appellant's brief in this court has not yet been served upon us, and will not be served in time to allow us to make a logical argument in answer to appellant's contentions. For that reason we are compelled to make an independent argument based upon the various assignments of error which have been filed herein by appellant.

ARGUMENT.

I.

Construction of F. P. A. Warranty In Marine Insurance Policy Sued On Herein.

The question to be argued under this heading was first raised by respondent in the court below (appellant herein) by its exceptions to the libel, which exceptions were argued before Judge Hanford, and his decision thereon is found in volume 184 of the Federal Reporter, page 947. After reviewing the cases, Judge Hanford held:

"The words 'on fire' are not synonymous with the word 'burnt', and the change of phraseology manifestly was not made without a purpose. Having no precedent to follow, this case must be decided according to reason and good sense. The words 'on fire' in connection with a ship do not comprehend necessarily every fire that may be on board of the ship, nor do they have the same meaning as 'consumed by fire,' or 'destroyed by burning.' They are indicative of a happening whereby the ship is endangered by actual fire burning some part of it and necessitating extraordinary efforts to prevent serious damage. A bulkhead between decks is part of the ship, as an inner partition wall is part of a house. A fire in that part of a ship would justify an alarm and if not promptly subdued would certainly be destructive, and such a happening would be truthfully described by saying the ship was 'on fire.'" (Record, p. 322.)

The construction of this warranty was again raised upon the final hearing in this case, and argued before Judge Neterer, District Judge. His opinion is found in 210 Fed. Rep., p. 958. Judge Neterer on this point stated (p. 959):

"It is strenuously urged that the fire was not sufficient to delete the 'F. P. A.' warranty and reliance is placed on the *Glenlivet,* Prob., p. 48, decided in 1893, and cited by the Supreme Court of the United States in *London Insurance vs. Companhia, etc.,* 167 U. S. 149, 156; 17 Sup. Ct., 785, 42 L. Ed. 113."

"In the form of the policy previous to the *Glenlivet* case, the word 'burned' was used in

the 'F. P. A.' clause. After this case was decided the words 'on fire' were substituted for the word 'burned.' No case has been suggested where the words 'on fire' have ever been before the courts in the same relation in any other case. The change of the words must have been made for a purpose. These words, as stated by Judge Hanford in passing upon the exceptions to the libel in this case in (D. C.) 184 Fed. 949, are not synonymous. The policy sued on, in the body thereof in relation to 'corn,' etc., uses the term 'sunk or burned,' and in the margin, with relation to the cargo, especially provides sunk or 'on fire,' clearly evidencing a purpose in the minds of the parties to distinguish from the former term and construction. The testimony of Mr. Beckett, an average adjuster of London, England, shows that 'under clauses * * * containing the words 'on fire' it is the practice of the adjusters in England to consider the warranty open if some structural part of the vessel has been actually on fire.' It is clear that 'on fire' used in the policy was not to be considered as was 'burnt' in the *Glenlivet* case. The warranty is drawn in the nature of an exception to the liability of the insurer and is strictly construed against him." Citing this court's decision in the case of *Canton Insurance Office vs. Woodside,* 90 Fed., p. 301, opinion by Judge Morrow. Judge Neterer in conclusion stated:

> "The fire as shown by the evidence, was on some structural part of the ship and endangered the ship by actually burning some part of it, and this was sufficient to open the warranty clause." (Record, pp. 327-8-9.)

We thus have the decision of two district judges construing this F. P. A. warranty, which decisions

while not, of course, in any way conclusive upon this court, are entitled to great weight.

The F. P. A. warranty, so far as material upon this phase of the case, is as follows:

> Warranted free from particular average unless the vessel or craft or the interest insured be stranded, sunk or on fire."

As stated by Judge Neterer in his decision in the court below, the body of the policy provides, that it is agreed that the corn, etc., "are warranted free from average unless general, or the ship be stranded, sunk or burnt." There is no contention, however, but that the F. P. A. warranty first above quoted, which is attached to the policy in the form of a rider, overrides and controls the provisions in the body of the policy. In the absence of this rider containing the F. P. A. warranty, this policy of insurance, so far as this particular cargo of creosote in drums is concerned is a particular average policy, and covers both total or any partial loss of cargo. This F. P. A. warranty, however, which controls and overrides the other terms of the policy, changes the protection of the policy, so that instead of covering partial losses to cargo, it only covers total loss of cargo, unless one of the excepted events enumerated in the F. P. A. warranty should happen.

Upon the happening of this excepted event the policy is to be construed as though the F. P. A. warranty had never attached, and the insured is entitled to recover for any partial loss sustained.

London Assurance Co. vs. Companhia, etc., 167 U. S. 149 and cases cited.

Unless, therefore, the Sardhana was "on fire" within the meaning of this F. P. A. warranty, the appellee is not entitled to recover under this policy, as the loss sustained by it was only a partial loss.

A contract of insurance is a contract of indemnity, and the effect of a warranty such as the F. P. A. warranty in this case, is to restrict the liability of the insurer, or, as stated by Judge Hanford in the opinion above quoted, it is in the nature of an exception to the liability. This was clearly held by this court in the case of *Canton Insurance Office vs. Woodside,* 90 Fed. 301, where the cases are all cited and reviewed. The form of the policy is furnished by the insurance company. It is drawn by its officers, agents or attorneys, and presumably drawn in such a manner as to leave no cause for ambiguity, and of course is drawn primarily for its own protection and to evidence the intention of the parties thereto. Under such circumstances it is only fair and just that the policy or contract should be con-

strued most strongly against the insurance company, and in case of doubt any restriction upon its liability should be construed in favor of the insured, who, of course, takes the policy in the form in which it is drawn and presented to it by the insurance company.

> "If the company by the use of the expression found in the policy leaves it a matter of doubt as to the true construction to be given the language, the court should lean against the construction which would limit the liability of the company."
>
> *London Insurance Co. vs. Companhia,* 167 U. S. 149.

The Supreme Court, in the case above cited, quoted with approval from the case of *First National Bank vs. Insurance Co.,* 95 U. S. 673, as follows:

> "The company cannot justly complain of such a rule. Its attorneys, officers or agents prepared the policy, for the purpose, we shall assume, both of protecting the company against fraud and of securing the just rights of the assured under a valid contract of insurance. It is its own language which the court is invited to interpret, and it is both reasonable and just that its own words should be construed most strongly against itself."
>
> "In the case at bar the intention of the parties is not expressed as clearly as it might be, and hence any doubt that there may be is to be resolved in favor of the insured and against the insurer. A policy of insurance is a contract

> of indemnity, and is to be liberally construed in favor of the insured. *Yeaton vs. Fry,* 5 Crouch, 335 (3 L. Ed. 117); *National Bank vs. Insurance Co.,* 95 U. S. 673, 679 (24 L. Ed. 563); *Steel vs. Insurance Co.,* 2 C. C. A. 463, 51 Fed. 715, 723, and cases there cited; *Am. Ins.* (6th Ed). Sec. 295. If the policy will admit of two constructions, that one should be adopted which will indemnify the insured."
>
> *Canton Ins. Office vs. Woodside,* 90 Fed. 301, p. 305.

In construing the contract of insurance, the intention of the parties at the time of entering into the same, the understanding of the parties and the purpose of the contract as shown by the whole contract will be considered and, if possible, be enforced by the court in interpreting such contract.

In arriving at the understanding of the parties and the purposes of this particular clause, it is important to consider the history of this F. P. A. warranty, which is stated in *Gow Marine Insurance,* 3rd ed., pp. 183-187. This clause, as originally worded, read as follows:

> "Warranted free from average, unless general, or the ship be stranded."

It was afterwards found necessary to permit the occurrence of other casualties besides "stranding" to open up the exception, and the clause was then worded "warranted free from average unless gen-

eral or the ship be stranded, sunk or burnt" or some such similar cause. Afterwards the words "in collision" were added, usually followed by words of limitation as to the extent of such collision or the object collided with. The warranty was first used about 1749 in the form as first above stated, and about the year 1860 the words "sunk or burnt" were added, and most marine policies issued in England containing this F. P. A. clause have used the words "sunk or burnt" since that date. It was evidently the original purpose of this clause to limit liability for partial loss to the damage caused by the particular exceptions enumerated in the F. P. A. warranty; but the construction has been gradually broadened, so that at the present time it is established that in case of the happening of one of the excepted events the insured is entitled to recover for any partial loss sustained by him, irrespective of the fact of whether the loss was caused by the excepted peril or otherwise. *London Insurance Co. vs. Companhia,* 167 U. S. 149.

The case of the *Glenlivet,* Prob. p. 164, decided by Judge Barnes in the admiralty division of the High Court of Justice, in 1893, and affirmed in 1894, Prob., p. 48, by the Court of Appeals, is the only reported case in England or in the United

States, construing the word "burnt" in this clause which we have been able to find. The fact that this is the only reported case construing the word "burnt" seems to us an important point in considering the proper construction and understanding of the parties as to the clause in question. As stated by Mr. Gow, the word "burnt" was added to this F. P. A. warranty in the year 1860, and from that time up to the time of the decision in the *Glenlivet* case in 1893, a period of thirty-three years during which the word "burnt" was used in practically all marine insurance policies, numerous cases must have arisen in which it was necessary for the underwriters to decide, in order to adjust such cases, whether or not the ship was "burnt" within the meaning of the policy. The fact that no case was ever taken to the courts for a decision upon this point would strongly indicate that there was a clear and general understanding between the insurers and the insured as to what facts would or would not constitute a "burnt ship" within the meaning of this policy. If such an understanding had been vague and indefinite and the amount of burning necessary to delete the F. P. A. warranty was more than appears in the present case but less than the burning of the whole ship, there could have been no such

common ground of understanding and agreement between the insured and the insurers as would prevent in some cases a contest or dispute as to the amount of burning necessary to delete the warranty. Necessarily, there must have been some common ground of understanding and agreement or some of the innumerable cases which must have been adjusted under this F. P. A. warranty would have reached the courts for determination. On the other hand, if there had been such a common understanding and agreement that any burning of the *ship itself*, that is, *the structural part of the ship as distinguished from its cargo,* dunnage or other materials aboard was sufficient, there would have been no occasion for any dispute as to the liability in any such case of partial loss, and the fact that there are no reported cases construing the word "burnt" except the case of the *Glenlivet,* or any case up to the present time construing the words "on fire" would seem to us to clearly show a distinct understanding between the insurers and the insured that any burning of the fabric or structure of the ship itself was conceded to be sufficient in the first instance to satisfy the exception of "burnt" prior to the decision in the *Glenlivet* case, and certainly to satisfy the exception of the words "on fire," which were inserted

immediately after the decision in the *Glenlivet* case. Mr. Gow, in his work on *Marine Insurance,* 3rd ed., p. 80, clearly sustains this contention.

> "In the case of burning another difficulty arises. If the property insured is a cargo of flour, and if this interest takes fire and is burnt without the ship being damaged by the fire, the exception has not been taken out of the memorandum, and the underwriter remains free of claim for partial loss or damage of the flour. It is the ship that must be burnt, say a beam scorched, a floor charred, a ceiling burnt. Consequently the destruction of a cabin by fire removes the exception while a fire in the cargo itself does not. Such was the view acted upon almost universally until lately, but a recent decision of Mr. Justice Barnes (the *Glenlivet,* 1893) has raised a new point."

After discussing this decision, Gow further says:

> "The judgment in the *Glenlivet* case has excited considerable attention, as it takes away on principle what was long granted without question. * * * Since the issue of the decision some slips have had the words 'on fire' added to 'burnt,' confessedly *in the hope and expectation of thus restoring to the assured what has been taken from him by the decision."* (Italics ours.)

Here we have a direct authority for our contention. Prior to the decision in the *Glenlivet* case there had been a common and universal understanding between the insurers and the insured that any

burning of the *fabric or structure of the ship itself was conceded by the underwriter, and so understood and agreed to by the insured, to be sufficient to open up and delete this F. P. A. warranty.* This is also direct authority for the contention which we make and which we think will not be disputed, that the words "on fire" were added to the F. P. A. warranty immediately after the decision in the *Glenlivet* case for the sole purpose and expectation, as stated by Mr. Gow, "of restoring to the assured what has been taken from him by the decision." In other words, that the decision in the *Glenlivet* case being contrary to common understanding and agreement of the insured and the insurer as to the extent of burning necessary to delete this warranty, the words "on fire" were added so that there would be no future question but that *any burning* of the *structure* or *fabric* of the ship as distinguished from the cargo, would delete this warranty, and allow the insured to recover for a partial loss; that is, re-establish the common understanding which had been in effect for over thirty years prior to this decision. In the present case the word "burnt," as stated above, is found in the body of the policy, which is the old form, while the rider to the policy contains the substituted words of "on fire" in place of

"burnt." It was the contention of the appellant in the court below, and we suppose will be its contention in this court, that there is no difference between the meaning of the two words, but as stated by Judge Neterer, the substitution of the words "on fire" in the rider clearly evidences the purpose in the minds of the parties to distinguish between the words "burnt" and "on fire." It is apparent to anyone that this change was not made without some purpose, and we think it clear that that purpose is as stated by Mr. Gow. Certainly, such was the intention of the parties, and the intention of the parties in entering into a contract would control if the contract as a whole can be reasonably construed so as to carry out such intention.

On this point we would particularly direct the court's attention to the testimony of Mr. A. M. Becket, a witness produced on behalf of libelant in the court below. Mr. Becket is an average adjuster, and has been engaged in that business since the year 1897 or for a period of over seventeen years. Prior to the year 1911 he was connected with average adjusting firms in Liverpool and London, England, and while connected with such firms he adjusted many cases where an F. P. A. warranty identical with the one attached to the policy of the

appellant herein was involved. On page 229 of the record Mr. Becket testified that under an F. P. A. warranty similar to the one in this suit "it is the practice of the adjusters in England to consider the warranty open, if some structural part of the vessel has been actually on fire"; that the opening of the warranty does not depend upon the extent of the fire but depends solely on the fact as to whether or not the structure of the ship has been on fire, and on page 230 Mr. Beckett testified that from his experience as a practical English adjuster that such a construction of this warranty had never been contested by the English underwriters and further that from his experience he would consider that the *burning of a door which was built into the bulkhead of the ship would be a burning of the structure of the ship sufficient to open up or delete the warranty in this case.*

There is no doubt but that the construction placed on this clause by the English underwriters, merchants and adjusters is the construction which this court should place upon the same, provided the wording of the clause would sustain such a construction. We understand this to be appellant's contention. Appellant, however, contends that the wording of the clause will not bear any such con-

struction. The testimony of Mr. Beckett as to the practice of English underwriters, merchants and adjusters is uncontradicted. If this testimony had not been correct it would have been a very simple thing for the appellant to have secured testimony to contradict the same. In the court below the respondent (appellant herein) relied solely upon the decision in the *Glenlivet* case to sustain its contention that there was no difference between the words "burnt" and "on fire." However, we do not think that the *Glenlivet* case, when the same is carefully considered, would sustain any such contention, nor do we think that this case holds that such a burning as is alleged and proven in the present case would not make the ship "on fire" or a "burnt" ship within the meaning of the F. P. A. clause. In the *Glenlivet* case no part of the fabric or structure of the ship itself was "burnt" or "on fire." The only thing "on fire" was the coal in her bunkers, the slight injury sustained by the ship herself being merely from the heat of the fire in her coal bunkers. The ship was an iron ship and did not or could not burn in any sense of the word. While the appellate court approves the lower court's conclusion of the facts, the appellate judges did not lay down any rule as to what facts would or would not constitute a burnt

ship, and Justice Smith expressly disapproved the rule laid down by Justice Barnes that "the ship is burned whenever the injury by fire is sufficient to cause some interruption of the voyage, so that the vessel is *pro tempore* incapable of being properly used for the purpose of her voyage. That may be expressed by the term temporarily innavigable."

> "Then I come to the suggestion of my brother Barnes, which is that it must be a burning, such as to render the ship 'temporarily innavigable.' I do not think that this is right, because, supposing there was such a burning as only to stop the ship half an hour—suppose the ship was steered by rudder cords instead of by chains, suppose the rudder cords were burnt and the ship stopped for half an hour, would you call that a burnt ship? I should not, but that would come within my brother Barnes' definition of being 'temporarily innavigable' whilst the rudder cords were being adjusted. I cannot think that this direction is right.
>
> "My own view is that you would have to tell the jury what I have already said about partial burning, and you would have to tell them that a partial burning may, under some circumstances, constitute a burnt ship, and may not under other circumstances, and having given that direction you would have to ask them, has the fire been such as to bring the ship to such a condition that you can consider her a burnt ship within the meaning of the English language."

Justice Davey approved Justice Smith's opinion, as follows:

> "I also agree that Gorrell Barnes, J.'s definition is open to criticism, but I think it is really a question to be answered by the jury, has the ship in the circumstances of this case been burnt."

We say, therefore, that the decision in the *Glenlivet* case was based entirely upon the particular facts of that case and is not an authority against our position in the present case.

The following statement by Judge Lindley on appeal, would seem to indicate the basis of the appellate court's decision:

> "Although it is extremely difficult to draw the line, yet in ninety-nine times out of a hundred you can see on which side of the line a case falls. If you ask anybody to draw the line between light and shade when they fade off from one to the other, he cannot do it, but one can often see plainly enough whether an object is in light or shade, and many cases may be practically dealt with in that way.
>
> "I do not pretend to draw the line, but I can see as plainly as any juryman, or as any ordinary man can see, that this ship has not been burnt. That appears to me the true construction of this policy."

Judge Lindley could see that the facts in that case made it fall on one side of this indefinite line between "light and shade." And we think that the facts in the present case just as clearly make this

case fall on the other side under the clear and well understood meaning of the words used. We also think that it was the clear intention of the parties in this case by adding the rider with the words "on fire," to remove any doubt as to where the line should be drawn.

Construing the case of *Glenlivet,* Arnould (Section 891 on *Marine Insurance,* 7th ed.) says:

> "In the Glenlivet, a fire broke out on board the ship in one of the coal bunkers, severe enough to do some damage to the plating before it was extinguished. The shipowner contended that any fire doing any structural damage was sufficient to constitute a burning of the ship. The Court of Appeals, however, while agreeing that a partial burning might be sufficient, held that the question as to whether, under all the circumstances of the particular case, the vessel was, within the ordinary meaning of the English language, a 'burnt' ship, was one of fact and that *in this particular case* the vessel had not been burned." (Italics ours.)

In *London Insurance Co. vs. Companhia,* 167 U. S. 156, the court, in construing the words "in collision" in a similar clause, states:

> "It is impossible, as we think, to give a certain and definite definition to the words 'in collision' or to so limit their meaning as to plainly describe in advance that which shall and that which shall not amount to a collision within the meaning of the policy. The difficulty of

limitation or description is much the same as that pertaining to another expression in the same memorandum in regard to when a vessel is burnt. It is, however, obvious that a vessel would be said to have been in collision when the effect upon the vessel or the evidence of such a collision might be very much less than would be necessary to exist in a case of a fire, before one would describe a vessel as a burnt vessel."

The court considered the case of the *Glenlivet,* and after quoting extracts from the decision of Justice Smith in the appellate court, quote the following extracts from Justice Davey's decision:

"Counsel for the plaintiff says that the clause applies if a fire breaks out in any part of a ship although it has gone under before any great amount of damage is done to the ship. I cannot bring myself to think that any person would, either in the active use of language or in ordinary parlance, say that in such a case as that the ship has been burnt."

The learned judge also said:

"I think that it is really a question to be answered by a jury, has the ship in the circumstances of this case been burnt."

The Supreme Court then places the following interpretation upon the decision in the *Glenlivet* case:

"The English court took the view that as to a burnt vessel it must be such a burning as would constitute the vessel a burnt vessel within the ordinary meaning of the English language.

> The language is used in regard to the vessel as a whole, 'the company is to be free from average unless the ship be burnt.' That language would seem to indicate some essential burning of the vessel itself and not such a case as, put by one of the judges, of the burning of the cabin curtains. The case is referred to for the purpose of showing that the English court held the expression was defined according to the ordinary meaning of the English language. This leaves each case to be decided according to its own peculiar facts * * *
>
> "And we agree with those judges that the words contained in the memorandum are intended to be used as Davey, Lord Justice, said, in accordance with the 'ordinary use of language,' or, as said by Lord Justice Smith, 'within the ordinary meaning of the English language.'"

In the case of the *London Insurance Company vs. Companhia,* above cited, the court held, following the interpretation which it placed upon the *Glenlivet* case, that the vessel had been in collision, although the vessel at the time was at anchor and was struck a slight blow, not damaging her to exceed $250.

Under the criterion as laid down by the Supreme Court of the United States in the above case, we think there can be no doubt but that the Sardanha was "on fire" within the meaning of the English language. The word "fire" as defined in

Webster's Dictionary, is "a state of ignition or combustion," and the words "on fire" are defined as "burning." Bouvier defines the words "on fire" as the "effect of combustion" (p. 663). There can be no doubt but that the bulkhead of the Sardanha was "on fire," nor can there be any doubt but that this was "in a state of ignition or combustion."

But if there remain any question as to whether or not the Sardanha was "on fire," we think that an opinion given by Mr. Walton, who was the solicitor for the underwriters in the *Glenlivet case,* and by Justice Barnes, who decided the *Glenlivet* case in the lower court, given before he went on the bench would finally dispel any such doubt. This opinion is found in a note on page 51 of *Owen's Marine Insurance, Notes and Clauses,* 3rd ed., referring to the word "burnt" in the F. P. A. clause. This opinion was given in 1886 prior to the decision in the Glenlivet case and, of course, prior to the substitution of the words "on fire" for the word "burnt". The note reads as follows:

> "The following was communicated by the Institute of London Underwriters to the members, December, 1886:
>
> " 'Unless the ship be stranded, sunk or burnt.' Efforts have recently been made to show that the burning of ship's stores (such as

bunker coal) cancels the above warranty in a policy on ship.

"The company having been favored with a copy of the opinion of Mr. Walton, which is supported by Mr. J. G. Barnes, have pleasure in giving it publicity:

"In reply to your inquiry, the warranty clearly is not deleted by the fire in the bunker coal which you describe.

"If the expression had been 'on fire' instead of 'burnt,' there might have been some doubt, but even in that case we should have said that unless part of the fabric of the ship was on fire, in the sense of itself supporting combustion as distinguished from being scorched by the heat from some other burning material, the warranty would not be deleted."

Here we find the solicitor representing the underwriters in the *Glenlivet* case, and the judge deciding that case in favor of the underwriters, advising the underwriters seven years before that if the expression "on fire" instead of "burnt" had been used there might have been some doubt, if even a fire in a bunker coal did not delete the warranty, but that if a part of "the fabric of the ship was on fire, in the sense of itself supporting combustion as distinguished from being scorched by the heat from some other burning material," then the ship would be "burnt" or in any event "on fire."

We do not think that appellant will claim that the bulkhead, or door built into the bulkhead, are not parts of the fabric or structure of the ship. Nor do we think it will claim that the structure of the ship as distinguished from its cargo and dunnage, supported combustion. The door of this bulkhead, is in evidence in this case as an exhibit attached the deposition of G. H. Wylie (Record, p. 159) and has been sent to this court as an original exhibit for inspection. (Exhibit G. H. W. No. 2.) An examination of this door will show conclusively that it not only supported combustion but that it was very badly burnt. This opinion of the solicitor for the underwriters, in the *Glenlivet* case, completely negatives appellant's contention that the ship would have to be on fire *as a whole* in order to delete this warranty, and it also negatives its contention that the words "on fire" are to be given no different interpretation from the word "burnt." This opinion also clearly shows that the words "on fire" were substituted for the word "burnt" after the decision in the *Glenlivet* case, to restore to the insured what might be construed as having been taken from him by that decision, and that this was done upon the opinion of the underwriters' legal advisers, so that the previous understanding and agreement between

the insurers and insured of the burning of the fabric of the ship would open up this warranty, would be re-established by substituting the words "on fire." We think it perfectly clear, both from the decision and from the established practice and understanding of the English underwriters, merchants and adjusters, that the words "on fire" as contained in the F. P. A. warranty, are satisfied and this warranty deleted whenever any portion of the fabric or structure of the ship as distinguished from its cargo and dunnage is actually on fire or supports combustion, no matter how trivial the damage sustained by the ship.

II.

Was the Sardhana "On Fire" Within the Construction of the "F. P. A." Warranty.

If the Sardhana was "on fire" within the court's construction of the F. P. A. warranty, then appellee is entitled to recover its entire damage. The question here is solely a question of fact. Judge Hanford held, in deciding the appellant's (respondents below) exceptions to the libel, that the words "on fire" as used in the F. P. A. warranty "are indicative of a happening whereby the ship is endangered by actual fire burning some part of it and

necessitating extraordinary efforts to prevent serious damage. A bulkhead between decks is a part of a ship, as an inner partition wall is part of a house. A fire in that part of a ship would justify an alarm and if not promptly subdued would certainly be destructive and such a happening would be truthfully described by saying that the ship was 'on fire.' "

(*Pacific Creosoting Co. vs. Thames & Mersey, etc.,* 184 Fed. 947-949.) (Record, p. 322.)

Judge Neterer in the court below followed the practice of the English underwriters and average adjusters as testified to by Mr. Beckett, in construing this clause.

> "The testimony of Mr. Beckett, an average adjuster of London, England, shows that 'under clauses * * * containing the words 'on fire,' it is the practice of the adjusters in England to consider the warranty open if some structural part of the vessel has been actually on fire.' * * * The fire as shown by the evidence, was on some structural part of the ship, and endangered the ship by actually burning some part of it, and this was sufficient to open the warranty clause."
>
> (*Pacific Creosoting Co. vs. Thames & Mersey, etc.,* 210 Fed., p. 960.) (Record, p. 328.)

In other words, both Judge Hanford and Judge Neterer squarely decided that the criterion as to whether or not the ship was "on fire" within the

meaning of this F. P. A. warranty was whether or not the fire was on some structural part of the ship—as distinguished from her cargo, etc.—and endangered the ship by actually burning some of its structural parts. The consequent damage is not material. We submit that this construction is not contrary to the decision in the *Glenlivet* case—in fact that it is in accordance with that decision in that it gives these words "on fire" a reasonable construction within the "ordinary meaning of the English language," and that it is strictly in accordance with the decision of the Supreme Court of the United States in *London Assurance vs. Companhia,* 167 U. S. at p. 158.

Following this construction of the F. P. A. warranty there can be no dispute in this case but that the Sardhana was "on fire" on November 18th, 1908. Appellant does not deny that the lazarette door which was built into and a part of the bulkhead was actually "on fire" and very badly burned. Having brought this door in as a part of the deposition of its witness George H. Wylie (Exhibit G. H. W. No. 2) and the door being before this court as an original exhibit, appellant is hardly in a position to deny that it was "on fire." It is quite evident, however, after reading the depositions

of appellant's witnesses, Alexander Wallace and George H. Wylie, that when appellant had this door introduced as an exhibit in connection with Wylie's testimony, that appellant had never seen the door, but had relied upon the statements of these witnesses to the effect that the door was *not burned,* but was merely scorched. An examination of the door will show that this is not true. Appellant, having been placed in this uncomfortable position by its reliance upon the statements of these witnesses, and having found from an examination of this door that it was badly burned, sought to prove that the fire damage was confined entirely to this door. Even if this were true, appellant could not escape liability, as this door was built into and a part of the bulkhead and was undoubtedly a structural part of the ship. (Beckett, Record, p. 230.) But the overwhelming weight of the testimony shows that not only this door but that a considerable portion of the bulkhead was burned, as well as a large amount of dunnage and ship's stores which were stowed immediately in front of this bulkhead.

The extended protest, a certified copy of which is a part of the record in this case as Libelant's Exhibit "L," contains the following statement with reference to this fire:

"November 18th * * * About 9:30 P. M. smoke was discovered issuing from the hatch by one of the crew, who immediately notified the master and then gave the alarm. This alarm was responded to by the crews of the ship 'Jupiter' and the S. S. 'Hornelen,' and the employees of the Pacific Creosoting Company, who brought with them several chemical fire extinguishers. The master went below through the lazarette, and saw the reflection of the fire over the top of the bulkhead between the after tween decks and the lazarette. The after tween decks were still full of cargo. After considerable trouble the fire was extinguished, and it was then discovered that the aforesaid bulkhead, together with the door thereof (the bulkhead was built in the vessel), and the dunnage in the after tween decks were burned and some of the ship's stores in the lazarette were damaged by water and chemicals.

"The origin of the fire was not discovered."

(Quoted in *Pacific Creosoting Co. vs. Thames & Mersey, etc.,* 184 Fed. 947.) (Record, p. 321.)

This protest, the statements of fact contained in which it is admitted (Record, p. 120, pp. 149-150) were copied from the ship's log (apparently having been entered on the day of the fire), was signed and sworn to before a notary public on the 28th day of December, 1908, by the captain, first mate and three sailors from the bark Sardhana. In view of the statements in the depositions of the master and first mate, we wish particularly to call the court's at-

tention to the fact that this entry was made in the ship's log by the officers of the ship as a part of their records *immediately after the fire,* and that the protest was signed and sworn to by them before a notary public a little over a month after the fire occurred. While the ship's log is sometimes kept and the entries therein made by the first mate, still it is the master's duty to see that such entries are correct. He is required by law to sign the log, and the responsibility for any mistakes therein falls upon him. The ship Sardhana is a British ship, and the master is governed by the British laws and regulations as to keeping his log. The British Merchants' Shipping Act, 1894, 57 and 58 Vict. c. 60, provides:

> "239—(1) An official log shall be kept in every ship (except ships employed exclusively in trading between ports on the coasts of Scotland) in the appropriate form for that ship, approved by the Board of Trade.
>
> (4) An entry required by this Act in an official log book shall be made as soon as possible after the occurrence to which it relates, and if not made on the same day as that occurrence shall be made and dated so as to show the date of occurrence and of the entry respecting it; * *
>
> (5) Every entry in the official log book shall be signed by the master, and by the mate, or some other of the crew, * * *
>
> (6) Every entry made in an official log

book in manner provided by this Act shall be admissible in evidence.

"241—(3) If any person wilfully destroys or mutilates or renders illegible any entry in an official log book, or wilfully makes or procures to be made or assists in making a false or fraudulent entry in or omission from an official log book, he shall in respect of each offence be guilty of a misdemeanor."

Maclachlan's Law of Merchant Shipping, 5th Ed. p. 852.

This log book is the property of the ship, the record of the events of its voyage. It is kept by or under the direction of the master, in accordance with the provisions of the Act above quoted. For false entries therein, the master or the person making the same is subject to punishment as for misdemeanor. Libelant in this case had nothing whatever to do with the entries made in this log book. Is it unreasonable for libelant to *rely* upon the entries made in this log book by the master and the mate, freely and of their own accord, as a part of the records of their ship?

In answer to the tenth cross-interrogatory, Captain Wallace admitted that he testified in another suit which was pending in January, 1909, less than two months after the fire, that the entries in this protest were absolutely true. (Record p. 121.) The

court will readily see by comparing the testimony of these witnesses with the entry in the log book, which was copied into the extended protest, that same is directly contradictory. These witnesses either swore falsely, or, to put it mildly, were mistaken when they testified in this case two and one-half to three years after the fire, or else they made a fraudulent entry in their log book and thus committed a misdemeanor, and further, swore falsely before a notary public in signing the protest. To give the witnesses the benefit of any doubt, is it not more reasonable to suppose that under the circumstances, they made a correct entry in their log book *immediately after the fire* when the matter was fresh in their minds, and that they were mistaken when they testified in this case years after the fire? (17 *Cyc.* 781, and cases cited.) If the court does not come to this conclusion, then it must conclude that the testimony of these witnesses is absolutely unreliable and of no value whatever.

Appellant (respondent below) contended that both Wylie and Wallace had fully explained in their testimony the statements in the protest which were contradictory to their testimony.

Mr. Wylie stated, in answer to cross-interrogatories 1, 2, 3, 4, 5 and 6, that he signed this protest,

that the protest contained the entry of November 18th, which was copied from the log, and that the entries in the log and the statements in the protest were true. His explanation, however, comes in answer to cross-interrogatory 7, where he states:

> "I think I might explain one statement of that protest. It states there that the Captain saw the reflection of the flames over the top of the bulkhead. That is an impossibility. The bulkhead extended up to the upper deck. Where the Captain saw the reflection of the flames was through ventilation holes cut into the bulkhead. That is the only part of the statement *with which I can find fault.* The ventilation holes were a few inches from the top of the bulkhead. By the word 'burned' in that protest I mean 'scorched' or to a slight extent affected by fire."

That is the only explanation made by Mr. Wylie, and we submit that it is far from satisfactory. As this bulkhead was approximately 7 feet high (Record p. 203), it must have been quite an active fire if the master saw the reflection of the flames through the ventilation holes at the top of the bulkhead. This testimony of Mr. Wylie was taken in London, June 28, 1911.

When it came to taking the testimony of Captain Wallace on August 26, 1911, we find that respondent goes into the matter of this protest itself, and asks the Captain to explain the entries therein.

The Captain approaches his explanation with much more assurance than the mate, possibly due to the length of time which he had had to think it over. The Captain admits the signing of this protest which contained this entry of November 18th, that it was copied from the log, and that he swore to the same as being correct, and in answer to cross-interrogatory 4, states that he believes the entries were true, although he did not make them himself. His explanation in answer to interrogatory No. 19, is as follows:

> "The bulkhead itself was not burned; it was the door that was burned, or charred rather; if you are going to distinguish the door from the bulkhead, I consider that the door is the bulkhead, or part of the bulkhead; and if you are going to mention the door and the bulkhead I would say it was only the door that was burned. I was not responsible for the language of the extended protest or the entries in the mate's log. The fact is that only the door was scorched and slightly charred, in part, and I did not see and do not see any use in distinguishing between door and bulkhead, as I consider the door a part of the bulkhead."

This certainly bears out our contention that the door was a part of the bulkhead, and if so, then the ship was "on fire" beyond any doubt within the lower court's construction of this F. P. A. clause.

The court will see that the original entry in the log book was as follows:

> "It was then discovered that the aforesaid *bulkhead, together with the door thereof,* (the bulkhead was built in the vessel) * * * was burned."

Here the distinction between the door and the other portion of the bulkhead is clearly made, and the Captain's attempted explanation becomes absurd. We submit that the alleged explanation of these witnesses makes their testimony absolutely unworthy of any credit or belief.

Appellant contended in the court below that this protest was prepared under the direction of appellee. We cannot see that this affects the matter in any way, as it is admitted that the entries in the protest were copied from the ship's log, and there certainly can be no contention that the libelant had anything to do with the preparation of the ship's log. The consignee in the case of damage to cargo has a right to demand a protest from a shipmaster, or members of his crew, in making up his proof of loss.

> *Ginsburg's Legal Duties of Shipmasters,* 2nd Ed. p. 141.

Appellant knows, and this court knows that this protest was not prepared for use against appel-

lant in this case, but was prepared as a part of libelant's (appellee's) proof of loss required by appellant and other underwriters at the time of submitting its claim for damage to cargo. This protest being admittedly a copy of the ship's log, is certainly admissible as evidence in this case. It is expressly provided in the Merchants' Shipping Act of 1894 that the ship's log shall be admissible as evidence. It would be admissible in rebuttal of the master's and mate's testimony, if on no other ground, it being admitted by them that they signed this protest under oath.

American and English Ency. of Law, 2nd Ed. Vol. 19, p. 1077.

Two days after the fire occurred, Mr. Frank Walker, a marine surveyor, made a careful examination of the vessel and of the damage done by the fire, the written report of which survey is a part of the record in this case marked "Libelant's Exhibit K". Mr. Walker found upon his examination that the permanent wooden bulkhead which divides the after 'tween decks from the lazarette was badly burned and charred, together with the door to same. Also that considerable dunnage in the after part of the 'tween decks close to the said bulkhead was more or less burned, and that the paint work in the after

'tween decks and lazarette was damaged by fire and smoke. Also that a quantity of the ship's stores had been damaged by water and chemicals, and that at the time of his examination, two days after the fire, there were signs of considerable water having been played into the after 'tween decks.

Mr. Frank Walker made the only survey that was ever made of this fire damage—he testified that the fire extended from 20 to 25 feet athwartships, including the door, and that the burning over the entire area was approximately the same as the door. (Record pp. 202-3.)

Fred D. Beal, superintendent of the Pacific Creosoting Company at the time of this fire, testified that a considerable portion of the bulkhead was burned as well as the door (Deposition of F. D. Beal, Record pp. 66-7.) Roy E. Douglas testified to the same effect. (Record pp. 187-8.) Also Fred N. Beal. (Record p. 60.) Respondent's witness Tuttle testified that the bulkhead was burned the same as the door. (Record p. 256.) We wish to call the court's attention to the diagram or exhibit attached to the deposition of Fred D. Beal, and to his testimony with reference to same (Record p. 96) showing the point of origin of the fire and area burned. There was in fact, a material fire on said

bark, doing damage to the extent of $150.00 to $200.00 to the door and bulkhead of said ship and so materially weakened the structure thereof that in the opinion of an experienced marine surveyor it should have been renewed and repaired. (Record p. 206.)

There can be no serious dispute but that the ceiling was at least blistered and smoked, or that a considerable portion of the dunnage in the after 'tween decks immediately in front of the bulkhead was burned (Record pp. 272-313); deposition of F. D. Beal. (Record p. 67.) We also wish to call the court's attention to the fact that this dunnage and the sacking, etc., immediately in front of the bulkhead door in the vicinity of the fire were more or less saturated with creosote, which is inflammable (Record pp. 194, 206, 80, 135), and that the drums of creosote were only a very short distance away from the seat of the fire; had this fire obtained good headway there would have been a very serious conflagration, probably resulting in the loss of the ship. (Record pp. 198, 206.) Extraordinary efforts were necessary and they were used in extinguishing this fire in order to save the ship. Immediately on discovering the fire, the alarm was sounded, which was responded to by the crew of the ship "Jupiter" and

the S. S. "Hornelen", and by the employes of the Pacific Creosoting Company. The employes of the Pacific Creosoting Company obtained chemical fire extinguishers and took same aboard the bark, and they were used in extinguishing this fire. (Deposition of F. D. Beal, Record pp. 63-4-5, 67; Deposition of M. I. Helman, Record p. 51; Deposition of Fred N. Beal, Record pp. 59-60.) (Libelant's Exhibit "L".)

Up to the time that the fire extinguishers arrived, the crew and officers of the bark, about 12 men in all, were engaged in passing buckets of water down to the 'tween decks to the seat of the fire, about 40 or 50 buckets being used. (Deposition of F. D. Beal, Record pp. 64-5; Record p. 304.) After the arrival of the crews of the "Jupiter" and the "Hornellen" and employees of the Pacific Creosoting Company, there were from 20 to 24 men engaged in extinguishing this fire. (Record pp. 302-3; Deposition of M. I. Helman, Record p. 51; Deposition of F. D. Beal, Record p. 64.)

Despite all of these efforts, it took from 40 minutes to one hour to extinguish the fire from the time that it was first discovered. (Deposition of F. D. Beal, Record p. 64; Record p. 300, p. 134.)

There is no dispute in this case but that a fire alarm was sounded as soon as this fire was discovered by the watchman on the ship. No one knows how long this fire had been burning before it was discovered by the watchman (Record p. 300). The probabilities are that the fire had already gained considerable headway. The court will keep in mind the fact that this fire occurred in the after tween decks of the said ship, and that the first intimation to anyone that there was a fire was when the tween decks were full of smoke and it was coming out of the ventilators (Record p. 300; protest Ex. "L"). Appellee's witnesses testified, as stated above, that the employees of the Pacific Creosoting Company responded to the fire alarm, bringing with them a number of fire extinguishers, or that the crews of the ship Jupiter and the S. S. Hornelen responded to the fire alarm, and that in all there were twenty to twenty-four men on board the said ship engaged in extinguishing this fire. This is confirmed by respondent's own witness Yeaton (Record, pp. 500-1-2). Appellant claimed in the court below that although these men responded to the fire alarm, and that the employees of the Pacific Creosoting Company brought fire extinguishers with them, still that they did not assist in putting out the fire; the

testimony, however, shows conclusively that these men did assist in putting out the fire, and that the fire extinguishers were used for this purpose. (Deposition of F. D. Beal, Record pp 64, p. 87; deposition of Helman, Record p. 51; deposition Fred N. Beal, Record pp. 59-60; Libelant's Exhibit "L"; Yeaton, Record pp. 300-302.) We do not see how there can be any dispute but that the structural part of the ship was "on fire," and that the ship was in imminent danger of being consumed, and that extraordinary efforts were necessary and were made to extinguish this fire. In this connection we wish to again call the court's attention to the testimony of Mr. A. M. Beckett, at pp. 229-30. Mr. Beckett testified that he had adjusted many cases containing F. P. A. warranties such as the one contained in the policy in this case, and that in adjusting loss or damage to cargo where the F. P. A. warranty contained the words "on fire" it has always been the practice of adjusters in England to consider the warranty opened if some structural part of the vessel had been actually on fire, and that the test as to whether or not the warranty was deleted was whether the structure of the ship had been on fire, and that the extent of the fire and the damage caused thereby were immaterial, and that in his long ex-

perience such a construction of the F. P. A. warranty containing the words "on fire" had never been contested by the English marine insurance underwriters. Mr. Beckett explains the reason for the substitution of the words "on fire" for the word "burnt," which was in common use prior to the first decision in the *Glenlivet* case, decided in 1893, reported in 7 Aspinal Cases, p. 342, the reason being that the assured demanded better protection after the decision in said case and would not consent to the use of the word "burnt," and insisted upon the insertion of the words "on fire." Mr. Beckett also testified that under the practice of marine adjusters, which has not been contested to his knowledge by the English marine underwriters, he would consider that the burning of the door which was built in the bulkhead of the vessel would be a burning of the structural part of the vessel sufficient to open up the warranty (Record p. 230). This testimony becomes important in view of respondent's contention, which we do not dispute, that the construction of this policy is to be determined by English law and practice.

The only evidence introduced by appellant to contradict the testimony of Mr. Walker, Mr. Beal, Mr. Douglas and the other witnesses who testified

on behalf of libelant, is the testimony of Captain Baird, marine superintendent of the owners of the Sardhana; Captain Wallace and Mr. Wylie, master and first mate respectively of the Sardhana; Mr. Yeaton, an apprentice on the Sardhana, and a Mr. Preece, a stevedore. Respondent says that Baird, Wallace and Wylie are disinterested witnesses. Possibly they are disinterested, but they certainly are not unbiased. A possible explanation of their attitude in this case might be the fact that there was considerable unpleasantness between the ship and the Creosoting Company on account of payment of freight on damaged and lost cargo. Mr. Stevens, manager of the Creosoting Company, testified: "We protested against payment of freight, but the charter party was made out and the number of drums being delivered, that we were to pay on the number of drums delivered. We were compelled to pay the freight." (Record p. 170.)

Captain Baird was in Seattle at the time of the fire, and on the day after the fire Captain Wallace came over to Seattle and reported to him that there had been a fire on board the ship (Record p. 268). He went over to Eagle Harbor the next day, found that the fire had taken place at the outside of the lazarette door, and that the door was scorched and

the under side of the deck stained (Record p. 268). He took no notes and made no written report (Record p. 273), and testified in this case four years after the fire occurred entirely from memory. On pp. 272 and 273 of the record it appears that Captain Baird had a very confused idea as to the difference between a burn and a scorch.

Respondent relies strongly upon the testimony of Captain Wallace and First Mate Wylie of the Sardhana. The testimony of these witnesses was taken upon written interrogatories in August and June, 1911, respectively, which is a very unsatisfactory manner of securing testimony upon so important a point, as there is no way of properly cross examining the witnesses. We have shown, moreover, that no reliance can be placed on the testimony of these witnesses.

The other witnesses produced by appellant upon this point, Yeaton and Preece, testified solely from memory some four years and four months after the fire. Mr. Yeaton, on cross examination, testified as follows:

> "Q. Can you swear at this time that the bulkhead was not burned to any extent? Can you swear that at this time?
>
> A. Well, I would not like to swear that there was no damage done to the bulkhead.

Q. Would you swear that the ceiling was not smoked and blistered?

A. No, I would not swear that the ceiling was not smoked.

Q. Would you swear that it was not blistered from the flames and heat of the fire?

A. No, I wouldn't swear to that."
(Record, p. 306.)

This witness also testified that approximately forty buckets of water were passed below to put out the fire (Record p. 304). Witnesses Wallace and Wylie testified that there were only five buckets of water passed. Witness Yeaton also testified that there were twenty-four men on board passing water (Record pp. 302-3), and that the crews of the Jupiter and Hornelen and the employees of the Pacific Creosoting Company came on board and assisted in putting out the fire (Record pp. 303-4).

Mr. Preece testified that the door was charred, that the deck above was all blackened with smoke, and that the paintwork was all blistered (Record p. 286).

Respondent also introduced another witness, Tuttle, to prove the extent of the fire, but as the witness testified that a portion of the bulkhead was burned, no mention was made of his testimony in appellant's argument below (Record p. 256).

Before leaving this subject we wish to call the court's attention to Mr. Beckett's reference on cross examination to a fire aboard the steamship Watson, which was adjusted under this same F. P. A. warranty. The damage to the structure of the Watson was between $300 and $400—which was deemed sufficient to open this warranty (Record p. 240). In the adjustment of the Mechanicien loss by Mr. Beckett the damage was also trivial, but was considered sufficient under the English law and practice to delete this F. P. A. warranty (Record p. 243). Certainly under the *Glenlivet* case the underwriters would not have considered this vessel "burnt." This shows conclusively that the English underwriters and adjusters themselves place an entirely different construction upon the words "burnt" and the words "on fire."

We respectfully submit that the testimony of Mr. Frank Walker, a disinterested witness who made a careful examination and survey of this fire damage immediately after the fire, in the regular course of his business, corroborated as it is by the testimony of appellee's other witnesses, is entitled to more weight than the testimony of any of the witnesses produced by respondent in this case, and that the testimony herein shows conclusively that

the Sardhana was "on fire" within the meaning of this F. P. A. warranty. That is the sole question here. If the Sardhana was "on fire," then this warranty is immediately opened, irrespective of whether the damage or loss resulted from the fire or not.

26 *Cyc.* 682.
London Assurance Company vs. Campanhia, etc., 167 U. S. 149.

It is immaterial whether repairs were made or whether they were necessary. If the warranty has been deleted, libelant is entitled to recover its entire loss.

III.

Sue and Labor Expenses.

There is no dispute in this case as to the fact that the lighter alongside of the Sardhana, loaded with 272 drums of creosote, capsized on the night of November 21, 1908, as a result of which all of said drums were thrown into the bay. There is also no dispute but that the appellee was diligent in taking steps to save these drums and the creosote contained in same, and to thus minimize the loss. The parties have heretofore agreed that the "sue and labor" expenses incurred in saving these drums, as shown in the particular average adjustment, were

proper expenses, and that the same were paid by the appellee herein. The only contention which appellant makes in connection with the sue and labor expenses is that the barge which capsized on the night of November 21 was unseaworthy at the time the drums were loaded aboard it, and that, therefore, its policy of insurance never attached to the cargo aboard said lighter. In other words, that there is an implied warranty of seaworthiness as to lighters used in discharging cargo, and that this warranty, having been broken, the policy never attached, and that they are, therefore, not liable for these sue and labor expenses.

Appellant admitted in the court below that unless there was an implied warranty of seaworthiness as to this lighter, and unless this warranty was broken, they cannot escape liability for their proportion of the "sue and labor" expenses.

In our opinion, appellant is liable for its proportion of sue and labor expenses irrespective of its liability for its proportion of the loss and damage to the other cargo on the voyage from London to Eagle Harbor.

Under the F. P. A. clause above quoted, it is provided that "each craft or lighter to be deemed

a separate insurance." And further, that this policy covers "all risk of transshipment and of craft, lighterage and/or any other conveyance from the warehouse until on board the vessel and from the vessel until safely delivered into warehouse." And in the body of the policy it is provided: "Including the risk of craft and/or raft to and from the vessel." The barge or lighter which capsized on the night of November 21st was moored alongside the Sardhana during the day of November 21st, and 272 drums containing creosote were loaded onto the said lighter, the loading of the said drums having been completed about 5 o'clock p. m., at which time the longshoremen engaged in unloading the bark quit for the day. This lighter was left moored alongside as was customary so that her loading could be completed on the following day. During the night an unexpectedly heavy wind sprang up, causing the barge to capsize, throwing the 272 drums into the bay. (Survey Report, Libelant's Exhibit "J.") A survey was called for and, on the 23rd day of November, 1908, Mr. Frank Walker held a survey upon said lighter and recommended that bids for salving and recovering the drums from the bay be obtained and that the barge be towed to a safe place and put on the gridiron for examination. This was

subsequently done and the surveyor found that the barge was undamaged, was taking no water. Bids were subsequently called for and a contract let for the salving of the cargo. Certain expenses were incurred in connection therewith, amounting in all to $1,377.95 (Particular Average Adjustment, Libelant's Exhibit "M"; Libelant's Exhibit "G"; Stipulation, Record pp. 171-2; Libelant's Exhibit "H" and Record pp. 172-3), as a result of which 268 of said drums, together with their contents, of the approximate value of $3,200, were recovered. Four of said drums, together with their contents, of the approximate value of $63, were entirely lost. (Libelant's Exhibit "J.")

Under the clause above stated the insurance policy of the appellant undoubtedly covered this cargo which was loaded aboard the lighter, and, if no steps had been taken and expenses incurred by the appellee to recover the cargo, the appellant would have been liable for its proportion of the entire value of said cargo as a total loss. The clause that "each craft or lighter shall be deemed a separate insurance" means that a total loss of the cargo upon any particular lighter would entitle the assured to recover in full for said loss, although such cargo

amounted to only a small part of the entire shipment.

As was said by this court in the case of *St. Paul Fire & Marine Insurance Co. vs. Pacific Cold Storage Co.*, 157 Fed. 632:

> "It seems to us that under the clause of the policy that each craft or lighter was deemed a separate insurance, the correct view would be that a distinct liability was assumed when the goods were reloaded at St. Michaels."

In the above case, the goods were removed from the ocean steamer at St. Michaels to river steamers and barges for transportation up the Yukon river. In that case it was held that each of the river steamers and barges constituted a separate insurance so that the assured could recover for a total loss of any such steamer or barge, irrespective of the fact that the proportion of the cargo on such steamer or barge was only a small proportion of the entire shipment covered by the policy.

Any sums paid out or expenses incurred for the purpose of averting or minimizing a loss, which if such expenses had not been incurred, would have fallen upon the underwriters, are regarded in the nature of expenses of salvage, and are brought within the meaning of the "sue and labor" clauses of

marine policies. The test of a "sue and labor" expense is that it was incurred to avert a loss, or probable loss, which the underwriters would have been compelled to pay.

St. Paul Fire & Marine, etc., vs. Pacific Cold Storage, supra.

Arnold on Marine Insurance, 7th ed., Sec. 870.

Appellant's contention that this barge was unseaworthy is an affirmative allegation, and appellant is required to prove it by preponderance of the evidence.

Nome Beach, etc. vs. Munich Assurance Co., 126 Fed. 827.

This burden the appellant has not met. On the other hand, the testimony in this case shows conclusively that the lighter was seaworthy at the time it was put into use.

No one saw the lighter capsize, as this happened some time during the night. The testimony is uncontradicted that there was a heavy gale during this night. Mr. F. D. Beal says that there was a southeast gale (Record, pp. 69-70). This scow was examined and sounded for water on the night of the capsizing, *after she had been fully loaded,* and was found to be all right at that time (Record p. 70

of F. D. Beal). This lighter was carefully surveyed by a marine surveyor while in the water, and afterwards, when it had been removed from the water and placed on a gridiron (Libelant's Exhibit "J.") She was not leaking at that time and no repairs were ordered or made to the lighter before she was again placed in commission (Record p. 193, p. 213). In the face of this testimony, we fail to see how respondent can contend that the lighter was unseaworthy. These witnesses did not deny the heavy weather on this night; some of them admitted it and the balance of them did not remember whether the weather was bad or not. Their testimony as to the unseaworthiness of the lighter is all supposition based upon no facts whatever. Is this testimony entitled to any weight as against the testimony of a marine surveyor who carefully examined the lighter in the ordinary and regular course of his business, for the express purpose of ascertaining whether she was seaworthy or not, and who again placed her in commission without ordering any repairs whatever?

It is possible that this lighter did sink or capsize because of water in it, but if this is true, the water did not leak in through open seams as contended by appellant, but on account of the unusually heavy sea, the waves washed over the lighter and

the water went through her hatches into the hold (deposition of F. D. Beal, Record p. 94).

But even if appellant had met this burden and had established by a preponderance of the evidence that this lighter was unseaworthy, still we think that this defense would not aid them in the present case.

The appellant contended throughout the trial of this case in the court below that this policy was to be governed by English law and practice, the contract of insurance having been made and entered into in the City of London, Kingdom of Great Britain, "and was and is governed by the law of that kingdom." (Appellant's answer, paragraph VIII). This contention of appellant's is not disputed by the appellee in this case. Under the English law, the warranty of seaworthiness which is implied at the time of making and entering into a contract as to a ship does not extend to lighters which are employed to land cargo from the ship, where the insurance covers risks of craft from the vessel until safely landed in the warehouse.

Arnold on Marine Insurance, 7th ed., Sec. 689.
19 *Am. & Eng. Ency. of Law,* 2nd Ed., p. 1002.

Lane vs. Nixon, L. R. 1, C. P. 412.

"Where the insurance is on goods 'until safely landed' and the mode of landing is by

lighters, there is no warranty that the lighters will be seaworthy for that purpose."

26 *Cyc.* 645.

The reason for this rule is set out by Justice Keating in the case of *Lane vs. Nixon, supra:*

"The implied warrant of seaworthiness is here sought to be extended far beyond anything to which it has ever yet been extended. Hitherto it has been always considered to apply to the state of the vessel at the commencement of the voyage * * *. But here, the employment of lighters to land the goods seems to be a usual and ordinary incident of such a voyage, and has no reference whatever to the implied warranty of seaworthiness. I think it would be a dangerous step to extend that warranty in the manner contended for by the defendant's counsel."

Montague Smith, J., in the same case, stated:

"The implied warranty of seaworthiness is one which the law has engrafted upon the express contract of insurance. I think we are not warranted in extending it further than it has already been carried, which we clearly should be doing if we decided in favor of the underwriter in this case. The contention on the part of the defendant has been that the voyage consists of various stages, and that the warranty of seaworthiness applies to each of them. If the landing of the goods by means of lighters could have been said to form one of several stages of the voyage, possibly the principle contended for might have been extended to it. But I do not think it can in any sense be said to be a stage of the voyage. It is rather an accessory

> or incident of the voyage. Not only is it implied that the obligation of landing the goods is to fall upon the shipowner, but the owner of the goods has in distinct and express terms insured himself against risk *to and from the ship.* This particular risk was distinctly contemplated and in terms provided against. The goods were lost through a peril of the sea in being conveyed from the ship to the shore in the ordinary and accustomed manner. There is nothing to justify the extension of the implied warranty of seaworthiness to lighters so employed as in a fresh stage of the voyage. It would, I think, be extremely inconvenient if it could be done. The landing of goods in boats or lighters frequently takes place on dangerous coasts; and, if the master had to inquire in all cases into their sufficiency or seaworthiness, much delay and risk must necessarily arise. It would be making the right of the assured to recover depend upon the merest accident at a distant port. For these reasons, I am of the opinion that the implied warranty of seaworthiness does not attach upon lighters employed to land the cargo at the port of discharge, and consequently that the sixth plea is a bad one."

If the appellant in this case had been the owner of these lighters and had furnished them in unloading this vessel, there might possibly have been some ground for their contention, but even in such a case we do not think that there would be any implied warranty of seaworthiness. The facts in this case, however, show that the appellant did not own the lighters and did not furnish them to the stevedores, and had nothing to do with the loading of the

lighters. (Deposition F. D. Beal, Record p. 69.) The lighters were furnished by the Washington Stevedoring Company, who were discharging, under the master's supervision, the Sardhana (Assn. Cross-Int. 21, Dep. A. Wallace, Record p. 123). Respondent's witness Preece was head stevedore of the Washington Stevedoring Company (Record p. 278, p. 257), and respondent's witness Tuttle was a donkey-man for the same company (Record p. 247). It was the common practice to unload such cargo at Eagle Harbor by lighters (Record p. 257).

Counsel for the appellant in his argument in the court below contended that the case of *Lane vs. Nixon*, cited above, was not the law of England today. Counsel cited two cases:

The Galileo, XVIII Commercial Cases, part 3, p. 146, advance sheets,

and

The Vortigern, 8 Aspinall, M. C. 523,

which he claimed overruled the doctrine laid down in the *Nixon* case. We have not been able to get a copy of the decision in the *Galileo* case, but from counsel's statement below we understand that that was a case of transshipment under a contract of affreightment. If that is correct, then that case is easily distinguished from the *Nixon case,* which was a case of *delivery of cargo* which was covered by

a contract of marine insurance. Appellant contended below that the warranty of seaworthiness was the same in both cases, that is, under a contract of affreightment and under a contract of marine insurance. It was in support of this contention that it cited the case of *The Vortigern.* The latter case merely holds that the implied warranty of seaworthiness which attaches at the commencement of a voyage is the same in both cases.

> "There is no difference between the implied warranty of seaworthiness which attaches at the commencement of the voyage in the case of an assured shipowner and in the case of a shipowner under a contract of affreightment. In each case the shipowner warrants that his ship is seaworthy at the commencement of the voyage."
>
> *The Vortigern, supra,* p. 527.

The doctrine of that case is undoubtedly correct. The implied warranty of seaworthiness in a contract of marine insurance upon a vessel is a condition precedent to the attaching of a policy. If this condition is broken, the policy never attaches. In a contract of affreightment the seaworthiness of the carrying vessel is implied in the contract between the carrier and the shipper, the breach of which warranty makes the carrier liable for any loss occasioned thereby. There is this difference, however,

between a contract of marine insurance and a contract of affreightment: In a contract of marine insurance there is no implied warranty that the vessel shall remain seaworthy during the entire voyage. Seaworthiness at the commencement of the voyage satisfies the implied warranty and, the policy having once attached, subsequent unseaworthiness will not avoid it.

Arnold on Marine Insurance, 7th ed., Sec. 691.

In a contract of affreightment, however, seaworthiness at the commencement of the voyage is not all that is implied. The owner of the vessel must, if it is possible to do so, keep the vessel seaworthy during the entire voyage. The difference is clearly stated in

McLachlan's Law of Merchants Shipping, 5th ed., p. 467:

> "There is that peculiar to this condition in a policy that if satisfied at the commencement of the risk the contract in respect of seaworthiness on the part of the assured is performed (except as regards voyages in stages requiring different or further equipment). But in the contract of the shipowner as carrier is implied this stipulation that should the vessel become unseaworthy in the course of the voyage he must make her seaworthy if there be opportunity, or he must not proceed further."

The case of *Lane vs. Nixon* clearly holds that the unloading by lighters is an incident to or acces-

sory of the voyage and not a new or separate stage of the voyage, and that, therefore, the vessel being seaworthy at the commencement of the voyage, there is no liability warranting that the lighters used in this incident of the voyage will be seaworthy.

In the case at bar it is admitted that the Sardhana was seaworthy at the commencement of the voyage. Therefore, the warranty of seaworthiness implied in the contract of insurance has been complied with and there was no implied warranty that the lighters used in unloading her at her port of destination would be seaworthy.

The relation between shipper and carrier under a contract of affreightment is entirely different from the relation between the insurer and the insured in a contract of marine insurance. The bill of lading usually constitutes a contract between the shipper and the carrier. In the absence of any express contract, however, the carrier agrees to carry the goods of the shipper and safely deliver the same to destination. For the purpose of this carriage and delivery the carrier warrants, not only that the vessel itself is seaworthy, but that all tackle, equipment, etc., necessary to carry and deliver the cargo are in a proper and seaworthy condition for such service, and failure to furnish such equipment would be such

negligence on the part of the carrier as would make it liable for all loss occasioned thereby. It is probably under this principle that the *Galileo* case was decided. As in all cases of transshipment of cargo, the carrier warrants that the agencies of the ship used in such service are proper, transshipment being the act of transferring the goods from one vessel, in which they have been carried, to another vessel, for the completion of another stage of the voyage.

Gow on Marine Insurance, p. 187.

Where such transshipment is made by the use of lighters or scows, the carrier warrants that such lighters or scows, being an agency of the ship, are seaworthy, and the furnishing of unseaworthy lighter would be such negligence on the part of the carrier as would make it liable for loss occasioned thereby.

In the case of carrier and shipper the goods are entirely under the control of the carrier, after they are laden aboard the vessel, and the carrier is held to a strict liability in carrying and delivering the goods. In the case of insurer and insured, neither of the parties has any control of the goods after they are laden aboard the ship, and, if the ship is seaworthy at the commencement of the voyage, the law places no further burden upon the insured as

the agencies of the ship in carrying and delivering the cargo are not in any way under his control, any more than they are under the control of the insurer.

If the case at bar was that of a loss by transshipment, the *Galileo* case might possibly have some bearing, as transshipment is sometimes held to be a new stage of the voyage, and an implied warranty of seaworthiness under the doctrine of a voyage in stages would probably apply to the new stage. But in the case at bar, the lighters were used as an accessory to, or incident of, the voyage.

The case of *Lane vs. Nixon, supra,* is clearly distinguished from the case of *The Galileo,* as we understand the facts and decision of *The Galileo* case, and we submit that the *Nixon* case is controlling in the case at bar. This case has been the law of England for over fifty years. It is cited with approval in

Arnold on Marine Insurance,
Cyc,
Am. & Eng. Ency. of Law.

We have been unable to find any case, either English or American, contrary to the *Nixon* case, and we are satisfied that this case is the law of England today.

Extent and Cause of Loss and Damage.

This shipment of iron drums containing creosote oil was loaded upon the British bark "Sardhana" at London, England, in the month of May, 1908, the loading of the same having been completed on the 29th day of May, 1908, upon which date the said bark by its proper agents issued its shipping receipt acknowledging receipt of 2,753 drums of creosote oil in good order and condition, from Blagden, Waugh & Company, which shipping receipt was endorsed in blank and forwarded to the libelant herein (Libelant's Exhibit "B"). Subsequently, Messrs. Blagden, Waugh & Company of London, England, as shippers, made out a consular invoice of said shipment, as required by law, which invoice shows the number of drums shipped, the number of gallons of creosote shipped in said drums, and shows in detail the cost of said shipment, including freight, insurance, etc., the aggregate of said detailed items being the cost of said shipment at port of destination. This consular invoice, a certified copy of which is part of the record in this case as Libelant's Exhibit "C", was made out before the American Consul in London, England, signed by the shipper, and sworn to by him as being correct,

and the original invoice was then forwarded to the United States Custom House at the nearest port of entry of said shipment into the United States, and it was upon this consular invoice that the duty was charged upon the different items of said shipment and paid by the libelant herein (Record pp. 147, 168). The shipping receipt (Libelant's Exhibit "B"), and the consular invoice (Libelant's Exhibit "C"), show that 2,753 drums of creosote, containing 251,134 imperial gallons of creosote, were loaded upon and received by the British bark "Sardhana" in good order and condition at the port of London, England, for shipment to Eagle Harbor, Washington.

After a tempestuous and rough voyage lasting approximately five and one-half months, the British bark "Sardhana" arrived at Eagle Harbor, Washington, with her cargo badly damaged, with the drums in a leaky condition, and a portion of the cargo loose in the hold of the ship. Mr. Frank Walker, a marine surveyor, at the request of libelant, on the 17th day of November, 1908, inspected and surveyed the cargo aboard the said bark previous to its removal from said vessel, and inspected and surveyed the said cargo on various dates as it was being discharged from said vessel, for the pur-

pose of ascertaining the amount of damage, if any, sustained by the cargo during the voyage. From the said inspection, examination and survey, Mr. Walker found that 2,012 drums were full and in good order, that 741 drums were damaged, of which number 716 drums were partly empty and 25 drums were entirely empty, and that the damaged drums were entirely unfit for further use and had no salable value (Libelant's Exhibit "I"; Record p. 190). As the drums were discharged from the vessel the good drums were placed in one pile, and the damaged drums were placed in another and separate pile. These damaged drums were carefully counted and examined by Mr. Frank Walker personally, and the figures in his survey report of 741 damaged and unmerchantable drums were compiled from his actual examination and count (Record p. 190). Mr. Barnaby, agent of Blagden, Waugh & Company, shippers of this shipment of creosote, attended at the time this creosote was being unloaded, as such agent, to see the condition of the drums and creosote. While Mr. Barnaby did not make as careful an examination and inspection of these drums as Mr. Walker made, and did not actually count the number of damaged drums, his estimate from his observation and examination

at that time was that about 700 drums were damaged, to such an extent that they were unmerchantable and of no value (Record pp. 224, 227). Mr. F. D. Beal, who was superintendent of the Creosoting Company in November, 1908, but who at the time of testifying was the manager of another creosoting company in Portland, Oregon, had an examination and inspection made of the damaged drums at the time they were discharged, and upon completion of the discharge of the cargo, sent a statement of the number of damaged drums to the office of the Pacific Creosoting Company in Seattle, Washington, which statement is in evidence in this case at appellant's request as respondent's Exhibit "I" (Deposition of F. D. Beal, Record p. 74). This statement was signed by Mr. F. D. Beal, and Mr. Beal swears positively that this statement was made from the original records taken at the time and correctly shows the number of drums damaged (Deposition of F. D. Beal, Record pp. 71-72). This statement corresponds with the number of damaged drums shown by Mr. Frank Walker in his survey report (Libelant's Exhibit "I"). Mr. E. D. Rood, assistant manager of the Pacific Creosoting Company in November, 1908, inspected the cargo at different times while it was being discharged and testi-

fied from his recollection, his testimony having been taken approximately two and one-half years after discharge of this vessel and long after he had severed his connection with the Creosoting Company, that between 750 and 800 drums were damaged, dented on the ends, the chimes being badly bent, some of them had holes in their sides, that they were all leaky, and that a number of them were empty (Deposition of E. D. Rood, Record p. 133). There is no evidence in this case to the contrary.

The contents of these damaged drums were emptied into the tank of the Pacific Creosoting Company and the amount of creosote obtained from them was carefully measured, these measurements being made under the supervision of Mr. Walker and Mr. F. D. Beal, superintendent of the Creosoting Company. When the contents of all the damaged drums and the three or four thousand gallons taken from the hold of the ship had all been dumped into the tank and measured, the total amount so obtained from said drums was deducted from the amount originally shipped in said drums, or the amount in the drums when they were delivered to the "Sardhana" in London, as shown by consular invoice (Libelant's Exhibit "C"), and it was found that 56,267.2 gallons had been lost during said voy-

age, or that the libelant was short this amount upon the outturn of this cargo. Mr. Walker checked these measurements and was absolutely satisfied that they were correct before making his report of survey (Record p. 191).

Mr. F. D. Beal made up a statement of the contents received from the 741 damaged drums discharged from the "Sardhana" and furnished the same to Mr. Walker, a copy of said statement having been furnished to the Pacific Creosoting Company's office in Seattle (Record pp. 71, 72, 74). This copy is in evidence in this case at appellant's request as respondent's Exhibit "2". Mr. F. D. Beal at the time of giving his testimony in this case, approximately four years after this statement was made up, was then unable to testify positively that the respondent's Exhibit "2" was a copy of the statement furnished by him to Mr. Walker, but from some of the records of the Pacific Creosoting Company which were in his possession at the time he testified, he testified positively that the outturn of 171 drums, being the first item shown on said exhibit, being 8,458 gallons, was a correct statement of the contents received from said 171 drums (Deposition of F. D. Beal, Record p. 74). This testimony of Mr. Beal, taken in connection with the testimony

of Mr. Walker, positively identifies this exhibit as a copy of the statement testified to by Mr. Beal, especially in view of the fact that the figures of the outturn of this cargo shown in surveyor's report signed by Mr. Walker (Libelant's Exhibit "I"), are identically the same.

Mr. E. D. Rood testified that his best recollection at the time of giving his testimony, not having any records before him at the time, was that between fifty and sixty thousand gallons of creosote were short in this shipment (Deposition of E. D. Rood, Record pp. 134, 137). Mr. Barnaby, who attended the discharge of this shipment as agent of the shippers, testified that when he examined the damaged drums, they were pretty well empty, and very little creosote in them. That he opened the bungs of many of the drums and found a good many of them were only one-third full and some of them were one-half full, but that none of them were more than one-half full (Record pp. 224-5).

Appellee has thus proven that 2,753 drums containing 251,134 imperial gallons of creosote were loaded on the bark "Sardhana" in good order and condition by Blagden, Waugh & Company (bills of lading or shipping receipts Libelant's Exhibit

"B", consular invoice Libelant's Exhibit "C"). The consular invoice (Libelant's Exhibit "C") certified as being a copy of the original consular invoice by the collector of the United States customs, signed and certified by the shipper and certified by the Collector of Customs of the United Kingdom at London, England, is proof of the cargo shipped both the number of drums and the gallons of creosote.

1 *Cyc.* 884 Sud-div. "A".

Arnould on Marine Insurance (7th Ed.), Sec. 1279.

Johnson vs. Ward, 6 E. S. p. 47.

Appellee has also proven by the direct and positive testimony above referred to that 741 of these iron drums were damaged and worthless on delivery and that 56,267.2 gallons of creosote were missing or short on delivery of this cargo at destination.

Appellant's contention below was that there was no shortage of cargo on delivery—as to the damage to 741, there seems to be no serious dispute.

This phase of the case presents a question of fact to be decided by the court from the preponderance of testimony and credit to be given to the testimony of the different witnesses. The court

below held that appellee had established the entire loss claimed by it.

> "The ship 'Sardhana' being seaworthy when she left London, the cargo in good order and condition when received by the ship, the damage to the drums being external, and it conclusively appearing that there was a loss of cargo, the libelant is entitled to recover his damage. *The Peter der Grosse* L. R. 1 P. D. 414; *Nome Beach etc. vs. Munich Assurance Co.* (C. C.), 123 Fed. 827."
>
> *Pacific Creosoting Co. vs. Thames & Mersey Marine Ins. Co.,* 210 Fed. p. 961.

We do not, of course, claim that this finding of the lower court is in any way controlling upon this court, but it is undoubtedly the rule that this court will not reverse a finding of fact made by the lower court upon conflicting testimony unless it is clearly against the weight of the evidence. Where the testimony is taken in open court this rule is particularly applicable—where it is taken before a commissioner, or by depositions, as in this case the rule is not as applicable. Just how much credit will be given to the lower court's findings upon disputed facts depends somewhat upon whether or not an appeal in admiralty is treated as a trial *"de novo"* or a review. Benedict holds that such appeals are in the nature of a review. That no decree is entered in

the Circuit Court of Appeals—the final judgment being in the District Court.

Benedict's Admiralty (4th Ed.), Sec. 566.

This was the view of Judge Dietrich sitting with this court in the recent case of *Pacific Mail S. S. Co. vs. Schmidt,* 214 Fed. 513. If this court acts as a court of review on appeals in admiralty, it will not, of course, reverse the lower court's findings unless they are clearly erroneous. But whether or not appeals in admiralty are treated as trial *"de novo"* or as a "review" the rule is as stated in 1 *Ruling Case Law,* Sec. 42, p. 436.

> "The conclusions of the District Court on questions of fact will not be reversed unless the appellate court can satisfy itself that it has reached new conclusions which are better supported by the evidence." (Citing *Steam Dredge No. 1,* 134 Fed. 161.)

There is certainly ample evidence in this case to support the lower court's finding. In fact appellant introduced no positive evidence as to the loss of creosote, but relies solely upon the negative testimony of Captain Alexander Wallace, Mate Wylie and Apprentice Yeaton of the "Sardhana", who testified that there was no leakage of the ship, and that the ship took no water during the entire voyage. We have shown in connection with Cap-

tain Wallace and Mate Wylie's testimony as to the extent of the fire on the "Sardhana", that their testimony is absolutely unreliable.

It is admitted that the "Sardhana" encountered very rough and tempestuous weather on the voyage, that the cargo worked and broke loose, and that she shipped considerable water aboard, while these witnesses state that during the entire voyage of six months she took no water. Witnesses Wylie and Yeaton testified that the pumps were not used once during the entire voyage.

Witness Wallace testified that, in the "Jupiter" case, heretofore referred to, which was pending in January, 1909, and is reported in 181 Fed. 856, he gave the following testimony:

> "Q. You say much water was shipped on deck?
>
> A. Yes. She took in a lot of water at times.
>
> Q. The fact is that the weather you experienced in rounding the Horn on this voyage, was exceptionally severe weather, was it not?
>
> A. Yes. It was the worst weather I have had coming around.
>
> Q. And continued for an exceptionally long time?
>
> A. Yes." (Record p. 121.)

For further evidence on this point we refer the court to the extended protest (Libelant's Exhibit "L"), which shows that on numerous dates the vessel shipped large quantities of water. It is inconceivable that on a voyage of this length, and in view of the weather encountered, and the admitted fact that the ship took considerable water, that the pumps were not used once during the entire voyage. The entry, "Pumps, lights and lookout carefully attended to," appears in the log-book of the "Sardhana" practically every day during the rough weather experienced by her. Mr. Yeaton claimed that this entry meant that the carpenter merely turned over the pumps and oiled them. He admits, however, that it was customary on this ship to only turn the pumps over and oil them once a week, and it is a significant fact that this entry appears during rough weather practically every day. (Record p. 311.)

First Mate Wylie testified that upon the arrival of the ship at destination there was approximately one foot of creosote in the hold of the vessel. It is shown by the testimony of Mr. Walker and Mr. E. D. Beal that not more than 4,200 gallons of creosote were pumped out of the hold of the ship after her arrival. We have no way of figuring just how many gallons one foot of creosote in the

hold of the vessel would be. It certainly would not be anything approximating 56,267.2 gallons, the amount of lost creosote. 56,267.2 gallons is more than one-fifth of the entire cargo. The ship was fully loaded when she left London. Certainly approximately one-fifth of her cargo loose in the hold of the ship would be more than one foot in depth. Where did the balance of the creosote go?

"Q. Have you any knowledge as to how that loss (56,267.2 gallons) occurred?

A. Well, I know that the creosote was not there. That the drums were leaky, and in my investigation I understood it was pumped overboard at sea.

Q. Would that be an ordinary precaution, if there was any great amount of creosote in the hold in rough weather?

A. Any great amount loose liquid in the hold of a ship in rough weather would be a damage to the vessel."

(Testimony of Frank Walker, pp. 191-2 of the Record.)

CROSS-EXAMINATION.

"Q. What became of the 56,000 gallons that were missing?

A. I don't know. All I can tell you is what the crew told me, that it was pumped overboard.

Q. What member of the crew told you it was pumped overboard?

A. I think several of them. The captain did not, but the mates did.

Q. The mates. That is the only way that it could be accounted for?

A. That is the only way; it was not in the bark.

Q. Could not get out of the ship. Do you know how much was finally pumped out of all the limbers?

A. Three or four thousand gallons."

(Testimony same witness, Record p. 217.)

The ship "Jupiter" made practically the same voyage as the "Sardhana". The two vessels arrived at Eagle Harbor at about the same time and were unloading at Eagle Hrbor at the sme time. (Deposition of Wallace, answer to 34th interrogatory, Record p. 119.) The "Jupiter" carried the same cargo as the "Sardhana", creosote in iron drums shipped by Blagden, Waugh & Company, shippers of the "Sardhana's " cargo, and arrived at Eagle Harbor with a shortage of 51,321 imperial gallons of creosote, and 1,220 damaged drums.

Knohr & Burchard vs. Pacific Creosoting Company, 181 Fed. 856.

In this case the court found:

"In the vicinity of Cape Horn, the ship encountered bad weather, and in a heavy gale she was thrown on her beam ends, and part of

the cargo between decks was dislodged, and a number of the drums were so damaged as to spill the oil, and others lost their contents by plugs working loose. Most of the spillage was pumped out of the ship and wasted, so that, when the cargo was discharged at Eagle Harbor, there was a shortage of 51,321 imperial gallons, worth $2,800.00, and 1,220 drums were damaged, and 272 drums were completely ruined."

In the *"Jupiter"* case the claim for damages, damage to and shortage of cargo, was made against the ship, on account of bad stowage, freight being withheld, but on account of the wording of the charter-party in this case consignee *was compelled* to pay freight on the number of drums delivered, irrespective of their condition or contents (Record p. 170). Furthermore, there is no claim of bad stowage in this case, the damage being caused by perils of the sea.

In view of the antagonistic attitude of the master and mate of the "Sardhana", probably due to the dispute between libelant and the ship as to the payment of freight on damaged and lost cargo, it was impossible for us to prove directly that any creosote was pumped overboard during the voyage. (The master and mate would hardly admit such a fact to the consignee of the cargo when they were attempting to collect freight on the said cargo.)

But we submit that this is the only reasonable explanation as to the loss of his cargo. It is unbelievable that on a voyage of this length, and in view of the weather encountered, that the pumps were not used once. Libelant having proven that this cargo was loaded aboard the "Sardhana" in good condition, that the ship encountered extremely rough weather during which the cargo broke loose and worked, and arrived in a damaged condition and with a big loss, the damage to drums being external, we submit that the burden was upon the appellant to prove that there was no such loss. This appellant has not done.

On the question of damage to drums, the only testimony introduced by respondent is that of First Mate Wylie. In answer to the 31st interrogatory he stated:

> "As to the damaged drums there was a United States custom house officer on board tallying the drums for the customs dues; I tallied the drums for the ship and a tally clerk for the Pacific Creosoting Company," etc. (Record pp. 147-8).

If this witness tallied the drums and his tally was less than that of appellee, why was he unable to produce his tally or to testify positively as to the number of damaged drums? The records of the

custom house were open to appellant, and appellee paid duty on drums according to the custom house tally. If this tally varied from appellee's, why did not appellant produce the custom house tally? The positive testimony of appellee's witnesses, substantiated by written surveys and reports *made at the time,* showing the amount of loss and damage to cargo, is entitled to more weight than the negative testimony of appellant's witnesses. These witnesses admit that the cargo was damaged, and that a large portion of it leaked out of the drums into the hold of the ship. Still they claim that there was no loss. We submit that this testimony amply proves the loss and damage claimed by appellee, and that the decree of the District Court should be affirmed with costs.

We do not understand that there is any dispute in this case as to the correctness of the particular average adjustment, provided, the loss and damage to cargo is proven to be as shown in said adjustment. The adjustment is based upon the value as shown in the consular invoice (Libelant's Exhibit "C"), which is the amount paid by libelant for this cargo (Record pp. 4, 5, 6, 7), as shown by vouchers (Libelant's Exhibits "D", "E", "E^1", "E^2", "E^3" and "F"). The value of the cargo is made up by taking

cost at works of shipper, plus cost of filling drums, loading same aboard ship, freight, insurance, etc. We think that appellant will raise no objection to this valuation.

Appellant contended in its argument below that it was not shown by the evidence how much damage and loss was occasioned by the perils insured against, and will probably make the same contention in this court under Assignment of Error 13.

Appellee proved that this cargo was delivered on board the "Sardhana" in good order and condition, that the ship encountered tempestuous weather during which the cargo broke loose and worked, and that the cargo was delivered in a damaged condition, such damage to drums being external, and that a large amount of creosote was short upon delivery. This, we submit, is all that the insured is required to prove. The burden is upon the insurance company of proving otherwise or that the loss or damage comes within the exceptions of its policy.

Appellant contended that a part of the damage was occasioned by the defective condition of the drums when shipped. In support of this contention it cites the testimony of Wallace and Wylie, master and mate of the "Sardhana". These witnesses based

their statement that some of the drums were defective solely upon the ground that creosote was observed in the limbers of the ship before they cleared the English Channel. The ship, however, receipted for this cargo as follows:

> "Shipped in good order and well conditioned by Blagden, Waugh Company in and upon the good ship called the 'Sardhana' * * * two thousand seven hundred and fifty-three drums of creosote oil."
>
> (Bill of lading, Libelant's Ex. "B".)

This bill of lading is certainly competent evidence to contradict the testimony of the ship's master. No exceptions as to the condition of the cargo were noted on this bill of lading. Captain Wallace further testified:

> "Q. Was not all of said cargo in apparent good order and condition when received on said ship?
>
> A. Yes. I rejected what we considered bad drums." (Record, cross-interrogatory 40, p. 113; Answer p. 125.)

Wylie testified to the same effect. (Record p. 159.)

Appellant admitted below that all of the damage, except the damage which it claims was caused by defective drums, was caused by "perils of the sea." The testimony clearly proves this. (Wallace,

Record pp. 111, 124, 125, cross-interrogatories 36 and 37 and answers thereto.)

It is admitted in this case that the "Sardhana" was seaworthy when she left London, that the cargo was properly stowed, and that the vessel met with unusually heavy weather during the course of the voyage, causing her cargo to work loose and become damaged. The damage to the drums was all external damage, they were dented on the ends, chimes were badly bent, they were stove in, and some of them had holes in their sides and they were all leaky. (Deposition of E. D. Rood p. 133; Libelant's Exhibit "I", Record p. 190.)

The clean bill of lading issued by the ship, and the testimony of Wallace and Wylie referred to above, are conclusive evidence that externally the goods had been shipped in good order and condition, and it being proved that the damage to the drums resulted from some external source, respondent, in order to free itself from liability, must prove that the drums were damaged or defective when shipped.

The Peter der Grosse, 1 P. D. 414.

Respondent's allegation, or rather contention, that some of the drums were inherently defective when delivered aboard the Sardhana, is an affirmative allegation on its part, and, under the rules of

evidence, respondent is required to prove such allegation by a preponderance of the evidence. We can see no difference between an allegation of defective condition of cargo, and an allegation of defective condition or unseaworthiness of a vessel, when it is set up as a defense to a claim against an insurance policy.

> "The allegation in the defendant's answer that the vessel was unseaworthy, was therefore an affirmative allegation on their part, and under the rules of evidence in such cases they are required to prove it by a preponderance of the evidence, and, failing in this, plaintiff was entitled to recover."
>
> *Nome Beach etc., Munich etc.,* 123 Fed. at p. 827.

But even if these drums were defective when shipped, still appellant would be liable, for there is no implied warranty in a policy on goods that the goods are seaworthy for the voyage.

Arnould on Marine Insurance, 7th Ed., p. 785.

This is especially provided in the *Marine Insurance Act* (1906), Sec. 40:

(1) (6 Edw. 7, Ch. 41, entitled an Act to codify the law relating to Marine Insurance.)

> "§40—(1) In a policy on goods or other moveables, there is no implied warranty that the goods or moveables are seaworthy."
>
> *Chalmers and Owens Marine Insurance Act,* p. 61.

If this case is to be decided according to English law and practice, as contended by appellant, then this act is binding.

Appellant will contend under Assignment 12 (as it did in the lower court) that before the appellee can recover it must show that the creosote was *on board* the Sardhana at the time the fire occurred on November 18th which deleted this warranty.

This contention, however, is not well taken. When the F. P. A. warranty is opened by the happening of the excepted event (in this case the fire) the warranty is deleted and the policy construed as though the warranty was not, and had never been, attached to the policy, that is, any loss under the policy, whether partial or total, is adjusted according to the general terms of the policy. There is no doubt but that appellee is entitled to recover this partial loss under the general terms of the policy.

If the excepted event happened before the insured goods were placed on board the ship, there would, of course, be no liability for injury subsequently happening to the said goods, the policy not having attached at the time of the happening of the excepted event. On the other hand, if the fire

happened after the goods had all been safely landed, there would be no liability for injury or damage to the goods, sustained during the course of the voyage, the policy having expired at the time of the happening of the excepted event. If the goods, however, are damaged or lost during the course of the adventure for which they are insured, and the excepted event, in this case the fire, also happened during the course of the adventure, it is immaterial whether the goods were damaged or lost prior or subsequent to the fire, the warranty being deleted, the insurer is liable for all loss or damage to the insured goods as though the F. P. A. warranty had never attached. As we have said, the effect of the F. P. A. warranty is to except the insurer from liability for any partial loss or damage to cargo during the course of the adventure, while the goods are insured, unless the ship be "stranded, sunk or on fire." Upon the happening of the fire, in this case, the F. P. A. warranty was completely effaced, and the insurer is liable for all loss or damage to cargo, whether partial or total, which happened during the course of the adventure, in accordance with the general terms of the policy. It will not be disputed that the loss of a portion of the cargo during the course of the voyage for which it is insured, is a partial or

particular average loss, and by the terms of this policy, in the absence of the F. P. A. warranty, the insurer is liable for any partial or particular average loss. "The 'stranding' (in this case fire) contemplated by the memorandum must be one which takes place after the adventure on the memorandum articles has commenced and before it has terminated."

Arnould on Marine Insurance, Sec. 887.

Thames and Mersey Marine Insurance Co. vs. Pitts, 7 Aspinwall Maritime cases (N. S.), 302.

This question was considered in the case of *London Assurance vs. Companhia,* 167 U. S. 149, and all of the English cases reviewed. We quote from this case as follows:

> "Although the original language of the memorandum confined the exception to a stranding of the ship, it was afterwards extended so as to read, 'free of particular average unless the vessel be sunk, burned, stranded, or in collision.' The same rule applies to all, and if the vessel be either sunk, burned, stranded or in collision, it is sufficient to render the insurer liable, although the loss does not result therefrom.
>
> In *Harman vs. Vaux,* 3 Campb. 429, Lord Ellenborough held that the stranding is a condition precedent, and when that is fulfilled the warranty against particular average ceased to have operation.
>
> In *Barrow vs. Bell,* 4 Barn. & C. 736, decided in 1825, the insurer was held liable, al-

though the cargo was not injured by the stranding, the injury having resulted from striking upon an anchor in the harbor. Abbott, Chief Justice, Bayley, Holroyd and Littledale, Justices, held the case of *Burnett vs. Kensington,* above cited, as entirely controlling, and that the insurers were liable.

In *Kingsford vs. Marshall,* 8 Bing. 458, decided in 1832, although the court held that in that case there was no stranding, yet Tindal, Chief Justice, recognized the general rule, and said: 'The question is whether, as the goods insured fall within those in the memorandum enumerated, the present case is taken out of the exception contained in such memorandum by reason of the ship being stranded; inasmuch as it has long been settled that the words "if the ship be stranded" are words of condition, and that if such condition happens it destroys the exception and lets in the general words of the policy * * *. For if the ship was stranded in Dunkirk harbor, an average loss upon the whole would be equally recoverable though it had happened from perils of the sea at any former time or any other place in the course of the voyage insured.' And he referred to *Burnett vs. Kensington* as authority.

In *Thames & M. Marine Ins. Co. vs. Pitts* (1893), 1 Q. B. 476, the court, in giving judgment, said: 'It is clear law that it is immaterial whether the actual mischief can be traced to the stranding * * *. If the stranding takes place within the time contemplated by the parties, the insured can recover in respect of a particular average, whether the damage can be traced to the particular stranding or not. This proposition is not only in accordance with common sense, but it is abundantly supported by

authority.' And he quotes from the judgment of Tindal, Chief Justice, in *Roux vs. Salvador*, 1 Bing. N. C. 526, in which the Chief Justice said: 'The general principle laid down in *Burnett vs. Kensington*, that if the ship be stranded the insurer is liable for any average damage, though quite unconnected with the stranding, is not disputed, the policy, after the stranding, must be construed as if no such warranty had been written on the face of it.'

In the *Thames & M. Marine Ins. Co.'s* case, *supra,* however, the court decided that where the stranding took place before the cargo was laid and the risk commenced, and the loss occurred after the loading, that the insurer was not liable. In other words, the court held that the stranding must take place in the course of the adventure, and that where it occurred before the goods were loaded and when the cargo was not at risk in the ship, the insurer was not liable. * * *

The English text-writers on marine insurance recognize the rule to be as above stated. See 1 *Marshall, Ins.,* 2d Am. from 2d London ed., 222, 234; *Lowndes, Marine Ins.,* Sections 317, 319; *McArthur, Marine Ins.,* 245."

"From the review of the authorities in England, there can be no doubt that if a ship be once in collision during the adventure, after the goods are on board, the insurers are by the law of England liable for a loss covered by the general words in the policy, although such loss is not the result of the original collision, and but for the collision would have been within the exception contained in the memorandum, and free from particular average as therein provided."

In the case of *Burnett vs. Kensington*, 7 T. R. 224 (English Ruling Cases, vol. 14, p. 187 at p. 198), Justice Kenyon, Ch. J., states:

> "The words of this policy are in general terms, including all cases; then comes this memorandum, 'corn fish * * * warranted free from average unless general or the ship be stranded.' This, therefore, lets in a general average, and I do not know how to construe the words grammatically but by saying that if the ship be stranded, then it destroys the exception and lets in the general words of the policy. If a general provision be made in any deed or instrument and it is there said that certain things shall be excepted unless another thing happen which gives effect to the general operation of the deed if that other thing does happen it destroys the exception altogether."

Justice Grose in the same case states:

> "On the words no doubt can be raised, they are clear. The insurers engage that certain articles, of which fruit is one, shall be free from average except in two cases—one if it be a general average, the other if the ship be stranded, but if either of these happen, then those articles are not to be free from average."

In the case of *Wells vs. Hopwood,* 3 Barn. & Ad. 29 (English Ruling Cases, Vol. 14 at p. 206), Justice Parke states:

> "In reading this memorandum two things are clear, first, that according to its grammatical construction, the simple fact of 'stranding' destroys the exception in favor of the enumerated articles contained in the memorandum, and in-

cludes them in the general operation of the policy, though no damage is thereby done to those articles."

Lord Tenterdon, Ch. J., in the same case states the law to be:

> "According to the construction that has been long put upon the memorandum, the words 'unless general or the ship be stranded' are to be considered as an exception out of the exceptions as to the amount of an average or partial loss provided for by the memorandum and, consequently, to leave the matters at large according to the contents of the policy."

Appellant in its argument below cited two English cases as supporting its contention. *Thames & Mersey vs. Pitts,* 7 Asp. Mar. Cases (N. S.) 302, and *Alsace Lorraine id.* 362. The first case is cited in *London Assurance Co. vs. Companhia,* 167 U. S. 149, cited above, as being a case where the stranding (the excepted event) "took place before the cargo was laid and the risk commenced." In the Alsace Lorraine a portion of the cargo had been sold and the balance had been forwarded by another ship at the time of the happening of the excepted event. These cases are not contrary to the rule as laid down in the cases cited by us. In the first case the policy had never attached, and in the second case, connection between the ship and her entire cargo had been

severed at the time of the happening of the excepted event.

Appellant contended in its argument below that if 56,267 gallons of creosote were lost from the Sardhana, such loss must have occurred during the voyage, that is, this creosote must have been pumped overboard or "jettisoned." The policy in this case covers both jettisons and general average losses. If this cargo was jettisoned during the voyage then the insured is entitled to recover irrespective of the F. P. A. warranty or the fire which happened on November 18th. Jettison is a general average loss. This policy covers all general average losses, and the insured has a right to recover his entire general average loss from his underwriter without seeking compensation from the other contributing interests.

Phillips on Insurance (3rd ed.), Vol. 2, Sec. 1348.

Potter vs. Providence Washington Ins. Co., 4 Mason 298.

19 *Federal Cases,* No. 11336.

Dickinson vs. Jardine, L. R. 3 C. P. 642 (English Ruling Cases, Vol. 14 at pp. 434-5).

Arnould on Marine Ins., 7th ed., p. 1023.

The only testimony as to this jettison of cargo is found on p. 191 of the record:

"Q. This report shows a loss here of 56,-267.2 gallons. Have you any knowledge as to how that loss occurred?

A. Well, I know that the creosote was not there, that the drums were leaky, and in my investigation I understood it was pumped overboard at sea.

Q. Would that be an ordinary precaution, if there was any great amount of creosote in the hold in rough weather?

A. Any great amount of loose liquid in the hold of a ship in rough weather would be a damage to the vessel."

And on page 217, on cross-examination:

"Q. What became of the 56,000 gallons that were missing?

A. I don't know. All I can tell you is what the crew told me, that it was pumped overboard.

Q. What member of the crew told you it was pumped overboard?

A. I think several of them. The captain did not, but the mates did.

Q. The mates. That is the only way that it could be accounted for?

A. That is the only way. It was not in the bark."

Naturally, if approximately one-fifth of the ship's entire cargo was in the shape of loose liquid in the ship's hold it would be dangerous to the ship during the rough weather she encountered, and if it was jettisoned for the safety of the ship, then it was a general average loss.

Appellant's last contention in its argument below was that the evidence showed that 427 drums had been delivered *prior* to the fire, and that in the absence of proof the presumption was that these were all damaged drums, and that therefore the creosoting company's claim should be reduced to this extent.

As we have shown in our argument above, the happening of one of the excepted events in the F. P. A. warranty during the course of the adventure, opens up or deletes the warranty, and the insurer then becomes liable, if at all, under the general terms of the policy. If there is a particular average or partial loss during the course of the adventure, and the excepted event occurs during the course of the adventure, then the insurer is liable for such particular average loss. In this case the damage to the drums was admittedly caused by perils of the sea occurring during the course of the voyage from London to Eagle Harbor. The fire occurred during the course of the adventure and immediately deleted the F. P. A. warranty, so that the insurer became liable for all damage or loss to cargo occurring during the course of the voyage, this being covered by the general terms of its policy.

Appellee proved that this cargo was shipped aboard the Sardhana in good order and condition, that it was damaged during the course of the voyage by perils insured against, and that the fire happened during the course of the adventure and while the goods were still at risk. If respondent seeks to avoid liability as to a portion of the cargo, upon the ground that it had been delivered prior to the fire, then the burden is upon respondent to prove that fact, the presumption being that the cargo was still at risk until the contrary is proven. This being an affirmative defense raised by the insured to defeat liability, it has the burden of establishing it. The only evidence on this point is the entry in the ship's log to the effect that 136 drums were *discharged* on November 17th and "Nov. 18th: Stevedores continued to discharge the cargo, and at 5 P. M. finished for the day. 291 further drums were *discharged.*" This entry in the ship's log, if competent proof, established the fact that the cargo had not been delivered but had been discharged on to lighters where it was still at risk. It does not show a delivery within the meaning of the policy of insurance. A discharge from the ship merely means the loading of said drums onto lighters alongside the ship. The policy in this case covers "risk of craft and/or raft

to and from vessel," also "including all risks of * * * craft, lighterage, and/or other conveyance * * * *from the vessel until safely delivered into warehouse.*"

Respondent's witness Tuttle, testifying with respect to the lighter which capsized, gave the following testimony:

> "Q. Did they tow her to the dock of the Creosote Company that night?
>
> A. No.
>
> Q. Would they not have done that if she had been fully loaded?
>
> A. There is lots of times they left the scows loaded for a day or two.
>
> Q. Fully loaded?
>
> A. Yes, sir.
>
> Q. Out on the bay?
>
> A. They would move them up some times alongside the ship forward, and move them around and moor them."
>
> (R. p. 95.)

The entry in the log book to which we have just referred shows that the stevedores quit work at 5 o'clock, having unloaded 291 drums from the ship into the lighter. The stevedores having quit work, these 291 drums, of course, were not towed to the Creosoting Company's plant and discharged into the

warehouse on that night, and were still at risk and covered by the policy. As to the 136 drums which were discharged on November 17th, or the day before the happening of the fire, we submit that the testimony of Mr. Tuttle as to the practice of leaving these scows moored in the bay, is at least *prima facie* proof that these 136 drums were also aboard the lighter at risk and covered by the policy.

There is ample evidence in this case, however, to show that the drums unloaded from the ship into the lighters before the happening of the fire were not damaged drums.

In answer to the 25th interrogatory, Captain Wallace stated that the cargo was loaded in the lower hold and tween decks (Record, p. 117). In unloading this ship it would, of course, be necessary to unload the cargo from tween decks before the cargo in the lower hold could be reached. The ship's log shows that at the time of the fire, the after tween decks were still full of cargo. (Entry of November 18, 1908; Libelant's Exhibit "L.") The stevedores commenced unloading cargo on November 17th, unloading 136 drums onto lighters on that day, and continued to unload cargo on the following day, the 18th, unloading 291 drums onto lighters on that day. It being necessary to unload the cargo from tween

decks before the cargo in the hold could be reached, and the evidence in this case showing that at the time of the fire cargo had been unloaded from the after tween decks, the cargo which was unloaded on the 17th and 18th of November, must have been unloaded from the tween decks. Mate Wylie, in answer to cross-interrogatory 15, testified that at the time of the fire the after tween decks were only *partly full of cargo* (Record p. 153). (Record p. 195.)

In answer to the 28th interrogatory (Record, p. 118), Captain Wallace stated that there was a small leakage all over the cargo, but that the biggest leakage was in the fore lower hold and amidships, abreast of the main ventilator, where creosote drums broke adrift and were found to be cut. In the ship's log, under date of July 29th, we find an entry "Toward night it was discovered that the cargo in the *hold* had commenced to work. The crew entered the hold from the lazarette and secured it as well as possible." In fact, in going through the entries in the log book, we find that when the cargo broke loose, the crew entered the hold to re-stow it, showing conclusively that the damage to drums by working of cargo on account of heavy weather was all in the hold of the ship, there not being a single entry

in the entire log that any of the cargo in the tween decks broke loose or was damaged.

The cargo discharged onto lighters on November 17th and 18th being taken from the tween decks, where no cargo had broken loose or worked during the voyage (this cargo being well stowed and in good condition upon arrival) (Record, p. ....), did not include any of the drums which were damaged, these drums being all in the lower hold.

As stated before in making our argument in this case, we have been at a great disadvantage by reason of the fact that we have not received a copy of appellant's brief, and therefore have been unable to answer appellant's argument in a logical manner. We have acted upon the presumption that appellant would raise the same contentions here as it did in the court below (all such contentions being covered by its Assignments of Error) and have endeavored in this brief to answer all such contentions.

Since writing the foregoing brief, we have this day, October 13, 1914, received copy of appellant's brief. We will not have time to answer this brief in any detail if we comply with the rules of this court as to the time of filing and serving our brief. We think, however, we have fully covered the different contentions made by the appellant, being practically the same argument which appellant made in the court below.

There are many statements in appellant's brief which are manifestly unjust and unfair to the appellee herein, and which are not sustained by any testimony in this case. Such a statement is that at the top of page 3, where appellant infers that this fire was of fraudulent origin for the purpose of opening up this F. P. A. Warranty. There is certainly no evidence of this fact, and we think that counsel should be severely criticized for making any such statement. The testimony does show that there was no officer, agent or representative of the appellee company on board the bark "Sardhana" on the night of the fire, but that she was entirely in charge of her officers and crew, the fire having occurred about 9:30 p. m. The attitude of the officers and crew of the "Sardhana" has been antagonistic toward this appellee throughout the

trial of this case. Appellant states, on the same page, that instead of attempting to enforce our claim against the ship for this loss and damage at a time when the matter was fresh in mind, the appellee, without notice of any claim whatever, waited for two years until the witnesses had become scattered, and then started this suit. It is significant that the appellant did not allege in this case as a defense, or otherwise, that the appellee had never given it notice of loss and proof of same, as required by its policy, and had not made a demand upon it for the amount of its loss prior to the bringing of this suit. Counsel for appellant knows, and this court knows, that, in accordance with the practice of merchants and underwriters, where the merchant is covered by insurance placed with several companies, in case of a partial loss coming within the terms of the various policies, it is necessary to have a particular average adjustment made so as to apportion the loss to the various insurance companies in the proportion the amount of their policy bears to the total insurance carried. This adjustment was made and bears date of May 18, 1909. Appellee alleged and the appellant admitted in the court below that a demand had been made against it for its proportion of this loss. Naturally, the

appellee, having sustained a loss and damage of approximately $10,000, would not sit idly by for a period of two years without making any claim or demand whatever, and then suddenly commence this expensive litigation to recover such loss and damage without giving the various underwriters any opportunity of paying their proportion of such loss.

Appellant's statement, on page 2, with reference to discharge of a portion of this cargo prior to the fire of November 18th, that part of said cargo had been "delivered" to the assured, and that the assured had "taken part of the cargo into its warehouse and was engaged in discharging and receiving the balance," is not sustained by a particle of evidence in this case. The only evidence on this point is the entry, under date of November 18th, as shown in the extended protest, to the effect that some 400 cases had been discharged into lighters, 291 of which this statement clearly shows were in lighters alongside the ship at the time of the fire.

Appellant's argument under subdivision 1 is, in our opinion, based upon an erroneous construction of the decision in the *Glenlivet* case. As the court will see from our citations above to *Arnould on Marine Insurance, the London Assurance vs. Companhia,* 167 U. S. 149, the *Glenlivet* case does not

decide that a vessel must be "burnt" *as a whole* in order to delete this warranty. It merely decides that the ultimate fact as to whether or not a ship is a "burnt ship" within the meaning of this F. P. A. warranty, is to be decided from the facts as they appear in each case in accordance with the *"ordinary use of the English language."* Manifestly, the word "burnt" as applied to a ship is not synonymous with the words "on fire." It would require much more burning of a ship to constitute her a "burnt ship" than it would to enable one to say that a ship was "on fire."

The appellant's contention under this heading that the F. P. A. warranty is an exception to the policy in favor of the *assured* and should, therefore, be construed most strongly against the assured, is a novel proposition of law. This court has squarely held in the case of

Canton Insurance Office vs. Woodside, 90 Fed. 301,

that this F. P. A. warranty is an exception in favor of the insurance company and should be most strongly construed against the insurance company or insurer. The wording of the policy is entirely that of the insurer. The body of the policy covers any partial or particular average loss, while this

F. P. A. warranty makes an exception in favor of the insurer so that the policy only covers for a total loss, unless one of the excepted events happens.

It is true that Mr. Beckett testified in this case that the words "on fire" were added to this F. P. A. warranty for the purpose of giving the insured better protection, and that the insured demanded this additional protection. In giving this testimony, however, Mr. Beckett was referring to the substitution of the words "on fire" for the word "burnt" in this F. P. A. warranty, subsequent to the decision in the *Glenlivet* case. This sustains our contention that the words "on fire" were substituted for the word "burnt" for this very purpose of giving the insured better protection, or of giving him the same protection as it was understood between the insurer and the insured, prior to the *Glenlivet* case, was given him by the word "burnt". This, however, is far from saying that the F. P. A. warranty was attached to the policy for the benefit of the insured, but even if it were true that this warranty was attached so as to give the insured better protection, this could only be done by agreement between the insured and the insurer, for which protection the insured would have to pay additional premium. The wording is that of the insurance company, and,

in a case of any doubt or ambiguity, it is strongly construed against it.

This is the principle decided in the cases cited by appellant on page 15 of its brief.

As we have fully covered the testimony as to the extent of the fire on the "Sardhana", we will not take the court's time in reviewing that testimony here. We would, however, call the court's attention to the testimony of Captain Wallace and First-Mate Wylie of the "Sardhana", quoted on pages 20 and 21 of appellant's brief. Both of these witnesses state that the only repair made necessary by this fire was to give the burnt door "a coat of new paint," or as stated by witness Wylie "simply a rub with a paint brush." An inspection of the door, which is in evidence as an orginal exhibit in this case, will clearly show that this testimony is not true. Appellant's testimony in this case shows that no repairs were made as the result of this fire. But this is not a criterion as to whether or not the vessel had been on fire. In the opinion of a disinterested marine surveyor, this vessel was damaged to the extent of $150 to $200, and should have been repaired. Whether she was or was not is immaterial.

On page 27, appellant again makes a statement that the entries in the protest are entitled to no consideration whatever because, as it claims, this protest was prepared for use against the appellant in this case. In the first place, this statement is inconsistent with the other statements made by appellant to the effect that this suit was an afterthought on the part of the appellee, and that no demand or claim was ever made against the appellant until two years after the fire. If this protest was prepared for use against appellant it was not prepared for use in this case, or in any case, but was prepared as a part of appellant's proof of loss, which shows that immediately after the damage was ascertained, appellee was diligent in securing its proof of loss for the purpose of making its claim against the underwriters. It is admitted, however, that the entries in this protest are copied from the ship's log, and as there is no contention that the appellee in any way influenced the officers of this ship in making up their log-book, and as the master and mate both testify that the entries in the log-book are correct, we can see no merit in appellant's claim that the appellee in any way influenced the officers in making out this protest.

Appellant contends, on pages 28 and 29, that Mr. Frank Walker's testimony is not to be believed for the reason that he testified that the contents of the damaged drums were taken by *meter* readings, and that Mr. Beal, the superintendent, testified that there was no meter on the tanks in which these drums were emptied. Mr. Walker's testimony was given some four or five years after the contents of these drums had been measured, and naturally, the details of just exactly what manner of measurement was made would not be clearly in his mind. His understanding of what a meter is might be different from that of Mr. Beal, who testified that what he meant by a meter was a device through which the creosote was run and which registered the number of gallons. What Mr. Walker meant by the word "meter" is not shown, nor do we think it material. He testified that he was in attendance for the purpose of finding out the shortage, if any, and the amount of damage to drums, and that at the time he made his report, he satisfied himself that the same was correct.

Appellant argues on page 33 that the applicant for insurance should have made it clear to the insurance company as to what protection he desired, or rather, what he construed the words "on

fire" to mean. The court will notice that both the policy and the warranty are in printed form, and it seems to us clear that it was the *duty of the insurance company to have so worded this policy and the warranty that there would be no cause for ambiguity.* In other words, that if the insurance company intended to limit its liability under the words "on fire" beyond the ordinary meaning of such words, it should have so inserted the limitation in its policy. It will be noted in connection with the words "in collision" that the insurance company has noted such limitation. It is not the duty of the insured to word the policy, nor would the insurance company allow the insured to dictate to it the wording of its own policies.

Appellant's statement on page 35, that Mr. Beckett's (the average adjuster of London, England, referred to by Judge Neterer in his decision in the lower court) experience prior to 1911 as an average adjuster is "not revealed," is an incorrect statement of fact. The record in this case shows that Mr. Beckett has been an average adjuster since the year 1897, and previous to his connection with Johnson & Higgins he was connected with the firms of F. C. Dawson & Co., of Liverpool, England, and

Manley, Hopkins' Son & Corliss, of London and Liverpool, England. (Record p. 228.)

Appellant spends a large amount of time in criticising the testimony of Mr. Beckett, but has offered no testimony whatever to contradict Mr. Beckett's testimony as to the practice of English underwriters and adjusters, in construing this F. P. A. warranty. If Mr. Beckett's testimony on this point was not correct, appellant could very easily have obtained competent testimony to contradict it. Appellant did take testimony in London, England, in this case, but it did not seek to take any testimony on this particular point, although contending throughout the trial of the case that this policy was to be construed according to English law and practice.

Under the next heading, appellant contends that the lighter which capsized on November 21st was unseaworthy at the time the cargo was loaded aboard her. As stated in our argument above, under this head, there is no warranty of seaworthiness as to such a lighter used in discharging cargo. The New York case cited on page 41 of appellant's brief was that of an instance where flat boats were used upon a distinct stage of the voyage, and the warranty of seaworthiness in that case would be a war-

ranty which is implied under the doctrine of voyage in stages as to each separate stage.

Examination of the testimony of Mr. Yeaton, referred to on pages 44 and 45, for the purpose of showing that there was no unusual weather on the night that this lighter capsized, will show that at the time Mr. Yeaton was not on watch, and knew absolutely nothing about the weather on the night in question and was probably asleep until he was awakened at the time the lighter capsized.

The testimony shows that Eagle Harbor was a land-locked harbor and considered perfectly safe (Record p. 265). While this lighter might not have been seaworthy in the sense that it would stand weather which is ordinarily encountered in the open sea, still there could be no doubt but that it was seaworthy for a land-locked harbor. The term "seaworthy" is a relative term. What would constitute seaworthiness under certain conditions would not constitute seaworthiness under other conditions.

> "It is obvious that there can be no fixed and positive standard of seaworthiness, but that it must vary with the varying exigencies of mercantile enterprises. 'The ship,' said Lord Cairns, 'should be in a condition to encounter whatever perils of the sea a ship of that kind, and laden in that way, may be fairly expected to encounter' on the voyage. That state of re-

pair and equipment which would constitute seaworthiness for one description of voyage might be wholly inadequate for another. * * *''

Arnould on Marine Insurance, Vol. 2, Section 710.

Appellant's statement, on page 59, that it was the custom of the creosoting company to tow these lighters away from the ship as soon as they were loaded, and that the creosoting company was negligent in leaving this lighter alongside the ship over night, is not borne out by the evidence, and appellant's own witness Tuttle testified, as we have stated above, that it was customary when a lighter was loaded to either leave her alongside the ship, or to tow her to a buoy in the harbor, sometimes leaving her there for two or three days. The testimony also shows, as we have stated above, that the unloading of the "Sardhana" was entirely in the hands of the Washington Stevedoring Company, under the supervision of the master of the "Sardhana" (Record p. 123; Answer 21st Int.), and that the appellee had nothing whatever to do with these lighters. The testimony does not show that this lighter was fully loaded. In fact, we think the testimony shows to the contrary, as it is admitted that this lighter had 272 drums on her at the time the longshoremen quit work for the day, while the

protest shows that the lighter which was left alongside of the bark "Sardhana" on the night of the fire had 291 drums aboard.

Under the next heading, on page 67, appellant contends that as Mr. Walker's survey is dated December 28th, and as the testimony shows that the contents of the drums discharged from the "Sardhana" were not all emptied until some time in March, that this conclusively shows that Mr. Walker made out his survey report before the drums were discharged. Mr. Walker's survey report, however, is not dated December 28th. It merely shows that he was in attendance at Eagle Harbor from November 17th to December 28th, 1908. Mr. Walker did not contend that he was in attendance at Eagle Harbor during all the time that the entire cargo discharged from the "Sardhana" was being emptied. In making his survey, Mr. Walker merely *measured the contents from the 741 damaged drums* which were partially empty at the time of being discharged. Mr. Beal, the superintendent, testified that these damaged drums were emptied first, that the leaky drums were emptied immediately upon being discharged from the "Sardhana" (Record p. 91). Mr. Walker would, of course, have no interest in watch-

ing the discharge or dumping of the drums which turned out in good order and condition.

On page 88, appellant contends that the entries in the protest show drums were found "adrift and rolling about in all directions," that these drums must have been on top tiers, and that, therefore, these drums were discharged first, and from this he concludes that of the 400, and some odd drums, which were discharged on lighters previous to the fire, they must have all been damaged drums. The fallacy of this argument, however, is that the entries in the protest show that the cargo which broke loose during the voyage was all in the *hold* of the ship. Before unloading this cargo, of course, it would be necessary to unload the cargo of the 'tween decks. The testimony of Mate Wylie shows that at the time of the fire a portion of the cargo had been discharged from the after 'tween decks, there being no testimony to show that any of this cargo ever broke loose or worked during the course of the voyage, so that it was in any way damaged, the testimony being that when the ship arrived at Eagle Harbor the cargo on her 'tween decks was in good condition and well stowed.

As we have answered the remaining portions of appellant's brief rather fully, we will not take up

the court's time in considering the appellant's argument in detail.

In conclusion, we respectfully submit that the appellee has proven by direct and positive testimony the entire amount of loss claimed by it; that it has proven this loss was all occasioned by perils insured against; and that it has proven that the "Sardhana" was "on fire," within the meaning of the F. P. A. warranty, to an extent sufficient to delete the said warranty and to entitle it to recover for the particular or partial loss as claimed.

These being all questions of fact decided by the lower court, upon disputed testimony, and there being ample and sufficient evidence in the case to sustain the lower court's conclusions, we respectfully submit that the decree of that court should be affirmed and that the appellee should be allowed its costs on its appeal.

Respectfully submitted,

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LAWRENCE BOGLE.